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LAW OFFICES
PIMA COUNTY PUBLIC DEFENDER
45 WEST PENNINGTON STREET, THIRD FLOOR
TUCSON, ARIZONA 85701
TELEPHONE: [602] 791-3300
DONALD S. KLEIN, # 31396
ATTORNEY FOR DEFENDANT

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

NO. _____

IGNACIO ALBERTO ORTIZ,

Petitioner,

vs.

THE STATE OF ARIZONA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

DONALD S. KLEIN
45 West Pennington, Third Flr
Tucson, Arizona 85701
Telephone: (602) 791-3300

Attorney for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Does not Arizona's death penalty law, as applied, deny due process of law and constitute cruel and unusual punishment?

2. Did not the procedure under which the sentencing court imposed the death penalty constitute cruel and unusual punishment and deny petitioner his rights to due process of law and to confront and cross-examine his accusers?

3. When the sentencing court determines that mitigating circumstances do not outweigh three aggravating circumstances and imposes the death penalty, but, on appeal, one aggravating circumstance is held to be invalid and a portion of a second aggravating circumstance is likewise found to be invalid, does not due process of law require that the case be remanded to the sentencing court for reconsideration of the death penalty in light of only validly applied aggravating circumstances?

LAW OFFICES
PIMA COUNTY PUBLIC DEFENDER
45 WEST PENNINGTON STREET, THIRD FLOOR
TUCSON, ARIZONA 85701
TELEPHONE (602) - 791-5500

LAW OFFICES
PIMA COUNTY PUBLIC DEFENDER
45 WEST PENNINGTON STREET, THIRD FLOOR
TUCSON, ARIZONA 85701
TELEPHONE: (602) 791-3305

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LAW OFFICES
PIMA COUNTY PUBLIC DEFENDER
45 WEST PENNINGTON STREET, THIRD FLOOR
TUCSON, ARIZONA 85701
TELEPHONE: (602) 791-3580

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LAW OFFICES
PIMA COUNTY PUBLIC DEFENDER
45 WEST PENNINGTON STREET, THIRD FLOOR
TUCSON, ARIZONA 85701
TELEPHONE (602) 791-3380

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CITATION OF OPINION BELOW

State v. Ignacio Alberto Ortiz, No. 4818 (Az. S.Ct., filed November 23, 1981). Motion for Rehearing denied January 12, 1982. Copies of the Opinion and the denial of the Motion for Rehearing are contained in the appendix.

STATEMENT OF JURISDICTION

On November 23, 1981, the Supreme Court of Arizona affirmed Petitioner's conviction and death sentence for first degree murder. Petitioner's convictions and sentences for three counts of attempted first degree murder, two counts of aggravated assault, one count of arson of an occupied structure, one count of first degree burglary and one count of conspiracy to commit first degree murder were also affirmed.

On January 12, 1982, the Supreme Court of Arizona denied Petitioner's Motion for Rehearing.

The mandate of the Supreme Court of Arizona issued on January 13, 1982.

This Court has jurisdiction to review the opinion of the Supreme Court of Arizona, pursuant to 28 U.S.C. §1257(3).

TABLE OF AUTHORITIES INVOLVED

(Set forth in appendix, supra.)

Sixth Amendment to the United States Constitution

Eighth Amendment to the United States Constitution

Fourteenth Amendment to the United States Constitution

Ariz.Rev.Stat.Ann. §13-703

LAW OFFICES
PIMA COUNTY PUBLIC DEFENDER
45 WEST PENNINGTON STREET, THIRD FLOOR
TUCSON, ARIZONA 85701
TELEPHONE (602) 791-3300

LAW OFFICES
PIMA COUNTY PUBLIC DEFENDER
45 WEST PENNINGTON STREET, THIRD FLOOR
TUCSON, ARIZONA 85701
TELEPHONE (602) 791-3380

STATEMENT OF THE CASE

On December 21, 1978, Manuelia McCormick died as a result of multiple stab wounds. Petitioner was indicted by the Pima County Grand Jury and charged with first degree murder in connection with her death. On December 21, 1978, the two daughters of Manuelita McCormick were stabbed, however, they recovered from their wounds. Petitioner was indicted and charged with two counts of aggravated assault in connection with those injuries. On December 21, 1978, the residence in which Manuelia McCormick and her family were residing was set on fire. Petitioner was indicted and charged with one count of arson and three counts of attempted first degree murder in connection with the fire. The three counts of attempted first degree murder arose because three children of Manuelita McCormick were in the residence at the time of the fire.

While awaiting trial, Petitioner was incarcerated at the Pima County Jail. Approximately three weeks after being held in jail, Petitioner and a convicted felon named Joe Alvarez became cellmates. After being Petitioner's cellmate for several weeks, Alvarez notified representatives of the Pima County Attorney's Office that Petitioner had solicited his assistance in a plan to kill the witnesses in Petitioner's murder case. On March 26, 1979, Petitioner and his wife were indicted and charged with conspiracy to commit first degree murder; it was alleged that Petitioner had conspired with his wife and Mr. Alvarez to kill six people in connection with his pending murder case. At his trial, petitioner testified that he had not conspired with anyone to kill the witnesses and that he had only talked with Mr. Alvarez about his pending murder case because he was afraid of Mr. Alvarez. R.T. 6/26/79

at 153, 158, 163, 196.

The charges arising out of the incident of December 21, 1978 and the conspiracy charge were joined for trial. Petitioner was convicted of all counts. After Petitioner was found guilty, the trial of Petitioner's wife commenced before the judge who conducted Petitioner's trial. Petitioner's wife testified during her trial. At the close of the evidence, Respondent moved to dismiss the charges against Petitioner's wife with prejudice. R.T. 7/6/79 at 247-48. The trial court granted the motion.

Prior to Petitioner's sentencing, he filed a Motion for a Bill of Particulars, requesting that the Respondent be required to specify which aggravating circumstances it would allege in support of its request for the death penalty and the facts alleged in support thereof. The trial court granted the Motion in part; however, the trial court did not require that the Respondent specify which acts it alleged supported the various aggravating circumstances.

Pursuant to Ariz. Rev. Stat. Ann. §13-703, the trial court conducted an aggravation-mitigation hearing. Respondent relied upon three aggravating circumstances:

1.) Pursuant to Ariz.Rev.Stat.Ann. §13-703(F)(1) that Petitioner had been convicted of another offense for which a sentence of life imprisonment or death was imposable, to-wit: the conviction for conspiracy to commit first degree murder;

2.) Pursuant to Ariz.Rev.Stat. Ann. §13-703(F)(3), that in the commission of the offense, Petitioner knowingly created a grave risk of death to another person or persons, in addition to the victim of the offense;

3.) Pursuant to Ariz.Rev.Stat. Ann. §13-703(F)(6), that the Petitioner committed the offense in an especially heinous,

LAW OFFICES
PIMA COUNTY PUBLIC DEFENDER
45 WEST PENNINGTON STREET, THIRD FLOOR
TUCSON, ARIZONA 85701
TELEPHONE (602) 791-3580

cruel or depraved manner.

At the aggravation-mitigation hearing, Petitioner argued the following mitigating circumstances:

1.) That Petitioner had no prior substantial criminal record;

2.) That Petitioner was a responsible member of the community with substantial employment and that he had served as a responsible officer in a local labor union;

3.) That Petitioner was a good father to his children;

4.) That Petitioner was under unusual and substantial duress;

5.) That Petitioner's ability to understand the wrongfulness of his conduct had been impaired because of his repressed emotional and psychological development;

6.) That the Petitioner had above-average intelligence;

7.) That according to the testimony of a psychiatrist, Petitioner would probably not be a repeat offender.

R.T. 10/4/5/79 at 141-49. Over the repeated objections of Petitioner, R.T. 10/4/5/79 at 26-28, 31-34, 79, 80-81, the trial court considered the testimony of Petitioner's wife during her conspiracy trial, as rebuttal evidence to the mitigating circumstances presented.

In accordance with Ariz.Rev.Stat.Ann. §13-703(D), the trial court returned a special verdict setting forth its findings as to the existence or non-existence of each aggravating and mitigating circumstance. (A copy of the special verdict of the trial court is reproduced in the appendix.) The trial court found that each of the three aggravating circumstances alleged by the Respondent existed. R.T. 10/15/79 at 4-7. It is unclear whether the trial court found that there were no mitigating circumstances or whether it found that the mitigating

LAW OFFICES
PIMA COUNTY PUBLIC DEFENDER
45 WEST PENNINGTON STREET, THIRD FLOOR
TUCSON, ARIZONA 85701
TELEPHONE: (602) 791-3368

LAW OFFICES
PIMA COUNTY PUBLIC DEFENDER
45 WEST PENNINGTON STREET, THIRD FLOOR
TUCSON, ARIZONA 85701
TELEPHONE: [602] 791-2368

circumstances were not sufficiently substantial to call for leniency. The trial court found that Petitioner was jealous and angry, but determined that this did not constitute duress. R.T. 10/15/79 at 7. The trial court found that Petitioner's lack of a prior criminal record, his intelligence, his responsible position in the community and his performance as a good father would ordinarily be mitigating circumstances. R.T. 10/15/79 at 9-10. However, the trial court ruled that these circumstances were not mitigating because of:

> "... the facts that the court learned principally from the trial and the testimony of the defendant's wife at her trial, that evidence disclosed, and the Court finds that the defendant was an adulteror, a violent wife-beater, and a liar."

R.T. 10/15/79 at 11-12.

The trial court, therefore, sentenced Petitioner to death. R.T. 10/15/79 at 31-32. On appeal to the Arizona Supreme Court, Petitioner argued that the Arizona death penalty statute was unconstitutional because it violated the Eighth and Fourteenth Amendments to the United States Constituion. The Arizona Supreme Court upheld the constitutionality of the Arizona death penalty law.

Petitioner also challenged the legality and the constitutionality of the imposition of the death penalty in his case. The Arizona Supreme Court held that imposition of the death penalty in the Petitioner's case was constitutional. However, in reviewing the aggravating and mitigating circumstances, the Arizona Supreme Court held that the trial court erred when it determined that the killing of Manuelita McCormick was especially cruel; the Arizona Supreme Court upheld the finding of the trial court that the killing of Manuelita McCormick was especially heinous or depraved. The Arizona Supreme Court also ruled that

the trial court erred when it determined that Petitioner had been convicted of another offense for which a sentence of life imprisonment or death was imposable. Although finding these errors in the sentencing of the Petitioner, the Arizona Supreme Court did not remand Petitioner's case to the trial court for a re-evaluation of the aggravating and mitigating circumstances and a redetermination whether the mitigating circumstances were sufficiently substantial to call for leniency. Instead, the Arizona Supreme Court, in its own independent review of the record, ruled that the mitigating circumstances were not sufficiently substantial to call for leniency. Therefore, it affirmed the imposition of the death penalty.

LAW OFFICES
PIMA COUNTY PUBLIC DEFENDER
47 WEST PENNINGTON STREET, THIRD FLOOR
TUCSON, ARIZONA 85701
TELEPHONE: (602) 791-3300

RAISING THE FEDERAL QUESTION

CONSTITUTIONALITY OF ARIZONA DEATH PENALTY LAW

On appeal, Petitioner challenged the constitutionality of the Arizona death penalty law, arguing that its application constituted cruel and unusual punishment and denied criminal defendants due process of law. See, Opening Brief at 50-56; Reply Brief at 39-48. The opinion of the Arizona Supreme Court upheld the constitutionality of the death penalty statute, as applied.

CONSTITUTIONALITY OF THE DEATH PENALTY IN THIS CASE

Petitioner has challenged the constitutionality of the death penalty in this case on three grounds. First, in a Motion for Bill of Particulars, filed with the trial court on September 5, 1979, Petitioner requested that the aggravating circumstances relied upon by Respondent be specified prior to the aggravation-mitigation hearing and that Petitioner be given notice of the facts which were to be alleged in support of those circumstances.

LAW OFFICES
PIMA COUNTY PUBLIC DEFENDER
45 WEST PENNINGTON STREET, THIRD FLOOR
TUCSON, ARIZONA 85701
TELEPHONE (602) 791-3385

This Motion was based upon the due process clause of the Fourteenth Amendment. The trial court granted the first part of the Motion, but refused to require Respondent to set forth the alleged factual underpinning of the aggravating circumstances. This issue was also raised in Petitioner's appellate briefs. See, Opening Brief at 38-40; Reply Brief at 24-25. The Arizona Supreme Court acknowledged that the due process clause of the Fourteenth Amendment required notice of the aggravating circumstances, but held that the notice which was given was sufficient.

The second constitutional defect in the imposition of the death penalty in this case arose during the aggravation-mitigation hearing. Allegedly to rebut evidence of mitigating circumstances, Respondent was allowed to introduce the testimony of Petitioner's wife during her trial. Petitioner objected to this evidence on the grounds that it deprived him of his right to confront and cross-examine witnesses against him. R.T. 10/4/5/79 at 26, 31-34, 78, 80-81. This denial of Petitioner's Sixth Amendment right was also raised in his appellate briefs. Opening Brief at 40-42; Reply Brief at 25-26. The Arizona Supreme Court held that there was no violation of Petitioner's constitutional rights.

The third constitutional defect arose out of the trial court's consideration of the aggravating and mitigating circumstances in this case. This issue was raised in two memoranda filed by Petitioner prior to the aggravation-mitigation hearing. See, Defendant's Memorandum on Aggravating Circumstances, filed October 3, 1979; Defendant's Supplemental Memorandum on Aggravating Circumstances, filed October 5, 1979. This issue was also raised in Petitioner's appellate briefs. See, Opening Brief at 43-50; Reply Brief at 29-38.

LAW OFFICES
PIMA COUNTY PUBLIC DEFENDER
45 WEST PENNINGTON STREET, THIRD FLOOR
TUCSON, ARIZONA 85701
TELEPHONE (602) 791-3580

REMAND TO TRIAL COURT FOR PROPER RECONSIDERATION OF DEATH PENALTY

In its opinion, the Arizona Supreme Court held that the trial court erroneously found one aggravating circumstance and partially reversed the finding of another aggravating circumstance. Nevertheless, the Arizona Supreme Court affirmed the imposition of the death penalty. In his Motion for Rehearing, Petitioner argued that the Arizona Supreme Court should remand the case to the trial court for reconsideration of the death penalty using only proper aggravating circumstances. Motion for Rehearing at 26-28. The Arizona Supreme Court denied the Motion for Rehearing.

ARGUMENT

THE ARIZONA DEATH PENALTY LAW DENIES DUE PROCESS OF LAW AND CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT

The imposition of the death penalty in Arizona is governed by Ariz.Rev.Stat.Ann. §13-703. That law mandates the holding of an aggravation-mitigation hearing before the trial judge. At the hearing, the Respondent has the burden of proving beyond a reasonable doubt the existence of at least one of seven aggravating circumstances. Only evidence which is admissible at a trial is admissible to prove aggravating circumstances. Respondent may rely on any evidence presented during the trial relating to either aggravating or mitigating circumstances without reintroducing it at the aggravation-mitigation hearing. Failure to prove any aggravating circumstances precludes imposition of the death penalty.

The accused has the burden of proving mitigating circumstances. Evidence which is used to prove mitigating circumstances need not be admissible at trial. After all the evidence

is presented, the trial judge must determine whether the mitigating circumstances are sufficiently substantial to call for leniency. The trial judge must make those findings in a special verdict.

This statutory scheme constitutes cruel and unusual punishment and denies due process in three ways. First, the aggravating circumstance embodied in Ariz. Rev. Stat. Anno. §13-703(F)(6) is overbroad and vague. That circumstance covers murders which are committed in an especially cruel, heinous or depraved manner. In Godfrey v. Georgia, 446 U.S. 420 (1980), this Court considered the issue whether the Georgia Supreme Court had adopted such a broad and vague construction of one aggravating circumstance so as to violate the 8th and 14th Amendments to the United States Constitution. This Court held that the Georgia Supreme Court had adopted such an unconstitutional construction. Ariz. Rev. Stat. Anno. §13-703(F)(6) suffers from the same malady. The genesis of this aggravating circumstance illustrates the overbreadth and vagueness inherent in its interpretation. The overbreadth and vagueness is reflected in its inconsistent application in trial courts.

The Arizona Supreme Court has adopted three different interpretations of this aggravating circumstance. Initially, the Arizona Supreme Court appeared to limit it to cases in which the victim was tortured or suffered extreme pain. See, e.g. State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978). This is the standard applied in Florida and virtually every other jurisdiction with a similar aggravating circumstance. See, e.g. Ex Parte Kyzer, 399 So.2d 330 (Ala. 1981); State v. Dixon, 283 So.2d 1 (Fla. 1973); State v. Culbreth, 390 So.2d 847 (La. 1980); State v. Stewart, 197 Neb. 497, 250 N.W.2d 849 (1977).

Subsequently, however, the Arizona Supreme Court adopted a

LAW OFFICES
PIMA COUNTY PUBLIC DEFENDER
45 WEST PENNINGTON STREET, THIRD FLOOR
TUCSON, ARIZONA 85701
TELEPHONE (602) 791-3368

LAW OFFICES
PIMA COUNTY PUBLIC DEFENDER
45 WEST PENNINGTON STREET, THIRD FLOOR
TUCSON, ARIZONA 85701
TELEPHONE: [602] 791-3500

more expansive interpretation to cover cases in which there was no torture to the victim. In those cases, a killing was held to be especially cruel, heinous or depraved if the defendant's conduct went beyond the point necessary to fulfill his or her criminal plan. See, e.g., State v. Blazak, 114 Ariz. 199, 560 P.2d 54 (1977).

The third interpretation given to this aggravating circumstance by the Arizona Supreme Court appears to encompass not only those cases which meet either of the previous two interpretations, but also virtually every other first degree murder. Under this interpretation, the killing is especially cruel if it inflicts pain upon the victim; the killing is especially heinous if it is hatefully or shockingly evil; a killing is depraved if it is marked by debasement. See, e.g. State v. Lujan, 124 Ariz. 365, 604 P.2d 629 (1979); State v. Knapp, 114 Ariz. 531, 562 P.2d 704 (1977). This interpretation is what the Arizona Supreme Court used in Petitioner's case.

The interpretation given by the Arizona Supreme Court fails to require a showing of torture or pitiless infliction of unnecessary pain on the victim. Courts which have considered such an aggravating circumstance have required that type of limitation. In State v. Culbreth, supra, the Louisiana Supreme Court noted:

> " We have stated that the concept of heinousness must necessarily include 'some idea of torture or the pitiless infliction of unnecessary pain on the victim.' State v. English, supra, at 823. Such a construction is necessary to protect the statute from attack on grounds of vagueness and overbreadth and to provide adequate guidelines for those involved in the sentencing process. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976)." 390 So.2d at 851.

Likewise, at least one member of this Court has declared that

a disjunctive interpretation of an aggravating circumstance similar to Section 13-703(F)(6) "would arguably be assailable on constitutional grounds." Godfrey v. Georgia, 446 U.S. 420, 454 (White, J. dissenting, 1980). By adopting a disjunctive interpretation of Section 13-703(F)(6) without requiring a showing of torture or the pitiless infliction of unnecessary pain on the victim, the Arizona Supreme Court has adopted an interpretation which is unlike the interpretation in any other jurisdiction, which is unconstitutionally overbroad, which is unconstitutionally vague and which fails to provide guidance in the exercise of a trial court's discretion.

The lack of guidance is best illustrated by comparing the decisions of trial courts in two death penalty cases. In State v. Steelman, 126 Ariz. 19, 612 P.2d 475 (1980) and State v. Gretzler, 126 Ariz. 60, 612 P.2d 1023 (1980), the trial of co-defendants in a first degree murder prosecution were severed. Each trial was conducted before a different judge. In State v. Steelman, the trial judge found that the murder was committed in an especially heinous manner. That finding was upheld by the Arizona Supreme Court. In State v. Gretzler, the trial court determined that the murder was not especially cruel, heinous or depraved. If this aggravating circumstance were more narrowly defined, and more precisely defined, then such dichotomies would not arise. The fact that this gross inconsistency did appear graphically illustrates the fundamental potential for the arbitrary imposition of the death penalty in Arizona in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

A similar vagueness exists when the trial court is required to determine whether the mitigating circumstances are "sufficiently substantial to call for leniency." No opinion of the Arizona

LAW OFFICES
PIMA COUNTY PUBLIC DEFENDER
45 WEST PENNINGTON STREET, THIRD FLOOR
TUCSON, ARIZONA 85701
TELEPHONE (602) 791-3380

Supreme Court has attempted to define when mitigating circumstances are sufficiently substantial to call for leniency. As a result, trial courts have reached conflicting conclusions when they attempt to weigh the aggravating and mitigating circumstances. For example, in State v. Rodriguez, 126 Ariz. 28, 612 P.2d 484 (1980), the defendant was re-sentenced to life imprisonment after the trial court was instructed to consider the age of the defendant as a mitigating circumstance. In contrast, in State v. Valencia, 124 Ariz. 139, 602 P.2d 807 (1979), the age of the defendant was not a sufficiently substantial mitigating circumstance to call for leniency. Likewise, in State v. Knapp, 125 Ariz. 503, 611 P.2d 90 (1979), the Arizona Supreme Court affirmed the imposition of the death penalty in a case where there was one aggravating circumstance and one mitigating circumstance. Yet, in State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979), the Arizona Supreme Court set aside the imposition of the death penalty in a case where, as in Knapp, there was one aggravating circumstance and one mitigating circumstance.

The impact of the decison of this Court in Furman v. Georgia, 408 U.S. 238 (1972), was that a state must adopt guidelines to avoid the arbitrary infliction of the death penalty. The Arizona death penalty scheme fails to satisfy that requirement.

In Furman v. Georgia, and Gregg v. Georgia, 428 U.S. 153 (1976), this Court emphasized the importance of effective appellate review of the death penalty. For the death penalty to be constitutional, a State should provide appellate review which insures consistency and proportionality in the imposition of the death penalty. See generally, Dix, "Appellate Review of the Decision to Impose Death," 68 Geo.L.J. 97, 106-109 (1979). The review undertaken by the Arizona Supreme Court in connection

LAW OFFICES
PIMA COUNTY PUBLIC DEFENDER
45 WEST PENNINGTON STREET, THIRD FLOOR
TUCSON, ARIZONA 85701
TELEPHONE (602) 791-3500

LAW OFFICES
PIMA COUNTY PUBLIC DEFENDER
45 WEST PENNINGTON STREET, THIRD FLOOR
TUCSON, ARIZONA 85701
TELEPHONE: [602] - 791-3380

with death penalty cases fails to satisfy the requirement for proportionality review. Proportionality review envisions a comparison between the case under review and cases which have previously been decided. The Arizona Supreme Court has never, at least explicitly, performed that type of review. The failure to give potentially mitigating factors the same significance also violates the requirement of proportionality. See, Dix, supra, at 107. The Arizona Supreme Court has never previously dictated that potentially mitigating factors be given the same significance. Appellate review in death penalty cases should also provide the basis for proper and consistent sentencing practices, including indicating what weight should be given to aggravating and mitigating circumstances. See, Dix, supra, at 109. The Arizona Supreme Court has failed to give that guidance as well.

For these reasons, the death penalty in Arizona is an unconstitutionally cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and further constitutes a denial of due process of law in violation of the Fourteenth Amendment to the United States Constitution.

IMPOSITION OF THE DEATH PENALTY IN THIS CASE DENIES DUE PROCESS OF LAW AND CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

The imposition of the death penalty in this case offends fundamental concepts of due process and constitutes cruel and unusual punishment in three respects: 1) Petitioner was denied adequate notice of the aggravating circumstances relied upon by the Respondent; 2) Petitioner was denied his right to confront and cross-examine witnesses against him when testimony of his wife at her trial was introduced into evidence purportedly to rebut the evidence he presented of mitigating circumstances;

3) the trial court and the Arizona Supreme Court improperly applied and weighed the aggravating and mitigating circumstances so as to deny Petitioner due process of law and his protection against cruel and unusual punishment.

In its opinion in this case, the Arizona Supreme Court recognized for the first time that a defendant in a capital case must be given notice of the aggravating circumstances relied upon by Respondent. However, the Arizona Supreme Court ruled that the notice given in this case was constitutionally sufficient. In making that ruling, the Arizona Supreme Court ignored the minimal due process requirements enunciated by this Court in In Re Gault, 387 U.S. 1 (1967). In Gault, this Court declared that "Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged misconduct with particularity.'" 387 U.S. at 33 [Footnote omitted]. The Arizona Supreme Court ignored the requirement of particularity.

The Arizona Supreme Court relied upon the statutory provision which mandates that evidence admitted at trial be considered at the aggravation-mitigation hearing without reintroducing it. Yet that can hardly qualify as setting forth "the alleged misconduct with particularity."

The reasoning of the Arizona Supreme Court in this case is analogous to its analysis in Gault. In Gault, the Arizona Supreme Court had decided that the juvenile's mother "knew the exact nature of the charge against Gerald from the day he was taken to the detention home." The Arizona Supreme Court based that assumption on the fact that the juvenile's mother had been oralled informed of the reason he was in custody. That type of notice is analogous to being present during a trial and trying

LAW OFFICES
PIMA COUNTY PUBLIC DEFENDER
45 WEST PENNINGTON STREET, THIRD FLOOR
TUCSON, ARIZONA 85701
TELEPHONE (602) 791-3388

to determine which facts will be considered by the trial judge as evidence in support of aggravating circumstances. Just as the notice in Gault was constitutionally defective, so the notice in Petitioner's case was likewise defective.

The admission of the testimony of Petitioner's wife during her trial to rebut evidence Petitioner had introduced to prove mitigating circumstances deprived Petitioner of one of the most fundamental due process rights, the right to confront and cross-examine witnesses against him. In Williams v. New York, 337 U.S. 241 (1949), this Court held that a defendant in a capital case did not have this Sixth Amendment right. That decision, however, does not compel the same holding in this case for at least two reasons. First, as this Court recognized in Gardner v. Florida, 430 U.S. 349 (1977), when Williams was decided, no significant constitutional difference was recognized between the death penalty and lesser punishments; since that time, this Court has recognized such a difference. As this Court declared in Gardner, "it is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." 430 U.S. at 358.

Second, the sentencing procedure in a death penalty case in Arizona is, in essence, a trial. This procedure contrasts greatly with the procedure in Williams. Because of the trial-like nature of the sentencing hearing, certain rights exist which might not otherwise. See, Bullington v. Missouri, ___ U.S. ___, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981).

Indeed, the sentencing procedure compares quite closely with the procedure which existed in Specht v. Patterson, 386 U.S. 605 (1967). For example, as in Specht, the sentencing judge in a death penalty case must make a new finding of fact which was not an ingredient of the first degree murder charge.

LAW OFFICES
PIMA COUNTY PUBLIC DEFENDER
45 WEST PENNINGTON STREET, THIRD FLOOR
TUCSON, ARIZONA 85701
TELEPHONE: (602) 791-3368

In Specht, this Court held that due process required that the defendant be present with counsel, have an opportunity to be heard, to offer evidence of his own and "be confronted with witnesses against him, [and] have the right to cross-examine...." 386 U.S. at 610. Petitioner was denied the right to be confronted with witnesses against him and the right to cross-examine.

In United States v. Bowdach, 561 F.2d 1160 (5th Cir. 1977), the Fifth Circuit evaluated the constitutionality of the federal recidivist statute. That statute, like Arizona's death penalty law, required a separate hearing with separate findings of fact. In its analysis, the Fifth Circuit reviewed the opinions in Specht and Williams. It concluded that defendants accused under the recidivist statute were entitled to minimal due process rights and that those rights included the right to cross-examine witnesses. Certainly because of the unique nature of the death penalty, Petitioner should have been accorded at least the same right.

The third way in which the imposition of the death penalty in this case denied due process and constituted cruel and unusual punishment arises out of the analysis of the aggravating and mitigating circumstances by the trial court and the Arizona Supreme Court. The trial court ruled that numerous mitigating circumstances were outweighed because Petitioner "was an adulterer, a violent wife beater, and a liar." R.T. 10/15/79 at 12. That finding was nothing but an unconstitutional enlargement on the statutory aggravating circumstances. None of the aggravating circumstances established by Arizona law consider whether a person is an adulterer, a wife beater or a liar. For the trial judge to have made such findings and for the Arizona Supreme Court to have upheld such findings, only one of two conclusions can be drawn. Either a sentencing judge

LAW OFFICES
PIMA COUNTY PUBLIC DEFENDER
45 WEST PENNINGTON STREET, THIRD FLOOR
TUCSON, ARIZONA 85701
TELEPHONE: (602) 791-3329

can include more than the statutory aggravating circumstances in determining whether to impose the death penalty; or the trial judge improperly considered non-statutory aggravating circumstances. In either event, the imposition of the death penalty would be unconstitutional. If the first conclusion were correct, then Arizona's death penalty law would suffer from the same defect which produced the decision of this Court in Furman v. Georgia, 408 U.S. 238 (1972). If the second conclusion were correct, then the Petitioner's death sentence was imposed contrary to law

Furthermore, in its review of the aggravating circumstances in this case, the Arizona Supreme Court deviated from established precedents, just as the Georgia Supreme Court did in Godfrey v. Georgia, 446 U.S. 420 (1980). For example, in its previous decisions interpreting Ariz. Rev. Stat. Anno. §13-703(F)(3), whether in the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense, the Arizona Supreme Court had limited its analysis to the act of killing the victim. As a result, the Arizona Supreme Court had reversed the finding of this aggravating circumstance in two cases in which the defendants had killed more than one person, because in the act of killing the first victim the defendants had not created a grave risk of death to the other people who were subsequently killed. See, State v. Clark, 126 Ariz. 428, 616 P.2d 888 (1980); State v. Ceja, 115 Ariz. 413, 565 P.2d 1274 (1977). Nonetheless, in deciding Petitioner's case, the Arizona Supreme Court explicitly considered events far beyond the act of killing Manuelita McCormack.

A similar deviation occurred when the Arizona Supreme Court evaluated whether the killing was especially heinous or

LAW OFFICES
PIMA COUNTY PUBLIC DEFENDER
45 WEST PENNINGTON STREET, THIRD FLOOR
TUCSON, ARIZONA 85701
TELEPHONE (602) 791-3305

depraved. The Arizona Supreme Court expressly relied upon events other than the killing of Manuelita McCormack in finding that the killing was especially heinous and depraved. The trial court did so as well. Yet, in State v. Johnson, No. 5239 (Az. S.Ct., filed Jan. 18, 1982), the Arizona Supreme Court held that it was error to consider events other than those encompassed in the offense which was committed in deciding whether an offense was committed in an especially cruel, heinous or depraved manner. In Johnson, the defendant pleaded guilty to solicitation to commit murder. In sentencing the defendant, the lower court considered the way in which the murder was to be committed. The Arizona Supreme Court held that this was erroneous, declaring, "The sentencing court must therefore focus on the offense that was actually committed. Appellant was convicted of solicitation, not murder. It was therefore error for the sentencing court to find this aggravating circumstance by considering the manner in which defendant intended, desired or acquiesced that the offense be carried out." Slip Opinion at 8.

BECAUSE THE ARIZONA SUPREME COURT REVERSED PART OF THE AGGRAVATING CIRCUMSTANCES FOUND BY THE TRIAL COURT, DUE PROCESS REQUIRES THAT THE CASE BE REMANDED TO THE SENTENCING COURT FOR RECONSIDERATION OF THE DEATH PENALTY IN LIGHT OF ONLY VALIDLY APPLIED AGGRAVATING CIRCUMSTANCES.

The Arizona Supreme Court reversed the finding of the trial court that Petitioner had previously been convicted of an offense for which a sentence of life imprisonment or death was imposable. It also reversed the finding of the trial court that the killing was especially cruel, although it affirmed the finding that the killing was especially heinous and depraved. Nevertheless, the Arizona Supreme Court did not remand the case to the sentencing court for reconsideration of the death penalty

LAW OFFICES
PIMA COUNTY PUBLIC DEFENDER
45 WEST PENNINGTON STREET, THIRD FLOOR
TUCSON, ARIZONA 85701
TELEPHONE (602) 791-3380

in light of only validly applied aggravating circumstances. Because of the unique role of an appellate court in a death penalty case, due process requires such a remand.

Courts which have reviewed this issue have concluded that the appellate court remand the case to the sentencing court. In Stephen v. Zant, 631 F.2d 397 (5th Cir. 1980), cert. granted No. 81-89, one of three aggravating circumstances found by the sentencing court was later held to be unconstitutional. The Fifth Circuit held that the death penalty was invalid, and that the case had to be remanded. In Hopkinson v. State, 632 P.2d 79 (Wyo. 1981), the Wyoming Supreme Court concluded that where the aggravating circumstances included one improper circumstance, "we must return the case to the trial court for a new sentencing trial." 632 P.2d at 171-72. Accord, Bufford v. State, 382 So.2d 1162 (Ala.Cr.App. 1980); Elledge v. State, 346 So.2d 998 (Fla. 1977); State v. Moore, 614 S.W.2d 348 (Tenn. 1981).

The reasons why a remand to the sentencing court is required are the same reasons why appellate courts are loathe to evaluate the sufficiency of evidence to sustain a conviction. The sentencing court has seen the witnesses; it has heard their testimony; it has seen the demeanor of the accused. To insure the integrity of the sentencing process in a death penalty case when an appellate court reverses any aggravating circumstance, it should remand the case to the sentencing court so that imposition of the death penalty can be reconsidered in light of only validly applied aggravating circumstances. Thereafter, if the death penalty is reimposed, then the appellate court can perform its function as dictated by the opinions of this Court.

LAW OFFICES
PIMA COUNTY PUBLIC DEFENDER
45 WEST PENNINGTON STREET, THIRD FLOOR
TUCSON, ARIZONA 85701
TELEPHONE (602) 791-3500

CONCLUSION

Arizona has adopted a death penalty law which, as it is applied, fails to provide proper standards and guidance to trial courts. At least one aggravating circumstance has been interpreted in an overbroad and vague manner. There are no standards to assist trial courts in determining whether mitigating circumstances are sufficiently substantial to call for leniency. Appellate review of death sentences fails to meet the standards established by opinions of this Court.

Petitioner was sentenced to death in derogation of his due process rights to adequate notice and to confront and cross-examine his accusers. In addition, in applying Arizona law to Petitioner's case, both the trial court and the Arizona Supreme Court deviated from established precedents.

Because the Arizona Supreme Court reversed certain aggravating circumstances found by the trial court and because of the unique role of an appellate court in a death penalty case, the Arizona Supreme Court should have remanded Petitioner's case to the trial court for reconsideration of the death penalty in light of only validly applied aggravating circumstances.

For these reasons, Petitioner prays that the Court grant his Petition and reverse his sentence.

RESPECTFULLY SUBMITTED this 31st day of March, 1982.

Law Offices
PIMA COUNTY PUBLIC DEFENDER

By Donald S. Klein
Donald S. Klein
Attorney for Petitioner

Copies of the foregoing
mailed/delivered this date to:

PIMA COUNTY ATTORNEY
111 West Congress
Tucson, Arizona 85701

ARIZONA ATTORNEY GENERAL
1275 West Washington, 2nd Floor
Phoenix, Arizona 85007

LAW OFFICES
PIMA COUNTY PUBLIC DEFENDER
45 WEST PENNINGTON STREET, THIRD FLOOR
TUCSON, ARIZONA 85701
TELEPHONE [602] 791-3368

PIMA COUNTY PUBLIC DEFENDER
45 WEST PENNINGTON STREET, THIRD FLOOR
TUCSON, ARIZONA 85701
TELEPHONE: [602] 791-3388

APPENDIX I

STATE V. ORTIZ, ___Ariz. ___,
___ P.2d ___ (No. 4818, filed
Nov. 23, 1981)

IN THE SUPREME COURT OF THE STATE OF ARIZONA
In Banc

FILED
NOV 23 1981
S. ALAN COOK
CLERK SUPREME COURT
BY

STATE OF ARIZONA,
Appellee,
v.
IGNACIO ALBERTO ORTIZ,
Appellant.

No. 4818

Appeal from the Superior Court of Pima County
Cause Nos. CR-00284 and CR-00767
The Honorable Ben C. Birdsall, Judge
Affirmed

Robert K. Corbin — Phoenix
Attorney General

William J. Schafer III — Phoenix
Chief Counsel, Criminal Division

Jack Roberts — Phoenix
Assistant Attorney General

Attorneys for Appellee

Richard S. Oseran — Tucson
Pima County Public Defender

Donald S. Klein — Tucson
Assistant Public Defender

Attorneys for Appellant

GORDON, Justice:

On July 2, 1979, a jury found appellant guilty of one count of first degree murder, three counts of attempted first degree murder,[1/] two counts of aggravated assault, one count of arson of an occupied structure, one count of first degree burglary, and one count of conspiracy to commit first degree murder. Following an aggravation-mitigation hearing on October 4 and 5, 1979, appellant was sentenced on October 15, 1979. The trial judge imposed the death penalty for the first degree murder conviction, life imprisonment for the conspiracy conviction, and the maximum sentence on each of the other charges, to run concurrently with each other and consecutively to the conspiracy sentence. Appellant now challenges the convictions on all counts and the sentence of death. We have jurisdiction pursuant to A.R.S. Const. Art. 6, § 5(3) and A.R.S. § 13-4031, and we affirm.

Appellant and his wife were the godparents of Manuelita and Charles McCormack, Jr.'s youngest child, Charles McCormack III. The McCormacks also had two daughters, Patricia and Bernice. At the time of the charged crimes, Patricia was nine years old, Bernice was eight, and "Baby Charlie" was three.

Charles and Manuelita McCormack were having marital difficulties in 1977-78. They had separated and Manuelita had considered filing for a divorce. During these difficulties, appellant saw Manuelita often and helped her and the children. There is some suggestion in the record that the relationship between appellant and Manuelita turned into a love affair. Manuelita and Charles reconciled, however,

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1/ The jury also found that these crimes involved the use or exhibition of fire, a dangerous instrument under A.R.S. § 13-604.

and Charles moved back into the house.

Appellant continued to visit Manuelita after the reconciliation but would do so only when Charles was not home. Appellant drove a white pick-up truck with a camper shell which a neighbor saw on several occasions parked in the alley behind the McCormack residence. Apparently, Manuelita tried to discourage his visits and eventually told him not to visit or telephone her anymore.

These events built to a climax on the evening of December 21, 1978. According to the testimony of Bernice and Patricia McCormack, the children went to bed that night in Patricia's bedroom around 9:00 p.m. Charles McCormack, Jr. testified that he left for work at about 10:00 p.m. A neighbor said she saw appellant's truck in the alley at 11:00 p.m.

During the night, Baby Charlie woke up and asked Bernice for a glass of water. Bernice testified that when she went to get a glass of water from the kitchen, she saw "Nacho," the nickname by which she knew appellant, and her mother on the living room floor. Her mother appeared to be sleeping, and appellant had his hands around her mother's neck. Bernice returned to the bedroom and awoke Patricia.

Shortly thereafter, appellant entered the bedroom and told the children that he was going to call an ambulance for their mother. Appellant left the room, and the children played with some clay. An ambulance never arrived, but appellant returned and told Patricia that her mother wanted to see her. Patricia went to the living room, whereupon appellant grabbed her from behind and stabbed her in the chest with a knife. Patricia, screaming, ran into her mother's bedroom and collapsed on the bed.

When Bernice heard the screams, she ran to her mother's bedroom to investigate. Appellant also grabbed her from behind and used the knife to stab her in the chest. Bernice ran back to Patricia's bedroom where Baby Charlie was still playing. Patricia testified that sometime during these events she thought she heard her mother plead, "Please don't hurt Baby Charlie."

Appellant had brought a can of gasoline with him to the McCormack residence. He poured gasoline on Manuelita and over the exit from the bedrooms. He also placed a delayed ignition device on a pile of clothes at the foot of Baby Charlie's bed. On his way out of the house, he told the children not to leave until the fire department arrived. Then he ignited the gasoline and departed.

Within a short time, Bernice smelled smoke. She rose from the bed where she lay, gathered Baby Charlie and Patricia, and helped them out of the house. Bernice and Baby Charlie struggled to a neighbor's house; Patricia collapsed on the sidewalk, and when the paramedics found her, she was near death.

The fire engulfed the living room before the fire fighters arrived and put it out. Manuelita's body had been badly charred. The pathologist found stab wounds in her neck and, judging from the pool of blood discovered under her body, deduced that she had been stabbed in the chest. Her chest was too burned to find any stab wounds, however. Although he found the cause of death to be stabbing, the pathologist testified that Manuelita may have been alive when the fire started.

The next day, appellant was arrested and jailed. While awaiting trial on the charges relating to the events of December 21, he moved in with another prisoner named Jose Alvarez. Alvarez

was in jail pending a trial on numerous robbery charges and had a history of drug abuse. He had also tried to escape from the jail and severely injured a knee in the attempt. Several weeks after they were put together, Alvarez was taken to the hospital for knee surgery.

When he got to the hospital, Alvarez contacted the Pima County Attorney's Office. He told them that appellant had offered him $10,000 to kill the three children, their father, their father's girlfriend, and Manuelita's sister with whom the children were staying. Alvarez was supposed to escape from the hospital and commit the murders. Alvarez also said that appellant had confessed in detail to the murder of his "comadre."[2/]

Alvarez agreed to help the county attorney's office with further investigation. He implicated appellant's wife in the conspiracy, and also made a telephone call, taped by the investigators, to appellant at the jail. Subsequently, appellant and his wife were indicted for conspiracy to commit first degree murder. The county attorney's office made a plea offer to Alvarez on the robbery charges in return for his testimony, under immunity, against appellant. Alvarez accepted.

The conspiracy charge was originally to be tried separately from the charges relating to the murder; appellant was appointed the same attorney for both cases. Trial counsel was a private attorney who had been paid only part of his retainer before appellant became indigent. Trial counsel agreed to accept appointment with partial retainer considered as part payment from the county for

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2/ The mother of a child is the "comadre" of that child's godfather in Mexican culture.

his work on the case.

A motion in limine was filed in the murder case to preclude all evidence of the conspiracy. When the motion was denied, trial counsel moved to join the trials, and this motion was granted.

The trial lasted two and one-half weeks. Appellant's defense to the murder related charges was alibi. His defense to the conspiracy charge was that Alvarez decided to help appellant by eliminating the witnesses against appellant and coerced appellant to help him through threats of physical force. The jury rejected both defenses and convicted appellant of all counts.

Appellant obtained new counsel for his automatic appeal to this Court. The following issues are raised:

(1) Did the trial court err in telling the venire that all teachers and students would be excused at their request?;

(2) Was trial counsel's assistance ineffective?;

(3) Should the trial court have granted a mistrial when the prosecutor asked a child witness if she was afraid of anyone and she replied she was afraid of appellant?;

(4) Did the trial court err when it instructed the jury that it could convict for conspiracy if it found appellant conspired against any of the six people named in the indictment?;

(5) Can appellant's conspiracy conviction stand when all of his coconspirators have been acquitted or have immunity from prosecution?;

(6) Is the death penalty sentencing procedure in Arizona constitutional?; and

(7) Was the death penalty properly imposed in this case?

JURY SELECTION

During voir dire, the trial judge told the jury panel the

trial might last three weeks and, "Any student or any teacher who is teaching, if they want to go, they may." Based on the right to a jury panel representing a cross-section of the community, appellant claims the court erred by granting such a blanket excusal. At trial, however, appellant passed the panel without objection.

We find State v. Arnett, 119 Ariz. 38, 579 P.2d 542 (1978) dispositive.

> "A defendant in a criminal case is entitled to a fair and impartial jury for the trial of his case, but he is not entitled to be tried by any particular jury; therefore, unless the record affirmatively shows that such a fair and impartial jury was not secured, the conviction must be affirmed. * * * Our review of the record has disclosed no evidence that the jury which heard this case was not fair and impartial, nor has appellant directed us to any such evidence. Ordinarily, the matter of excusing jurors is committed to the sound discretion of the trial judge, and in the absence of a clear and prejudicial abuse of that discretion, his action will not be disturbed on appeal; this is so even where the judge acts on his own motion. * * * We further note that appellant waived any objection in this regard, both by failing to object at the time of the excusal * * * and by expressly approving the panel at the conclusion of voir dire * * *."

Id. at 50, 579 P.2d at 554 (citations omitted).

In the instant case, appellant passed the jury panel at trial without objecting to its composition; therefore, any objection was waived on appeal. We note that this is not a case where a class of potential jurors was precluded from serving on any venire as in Duren v. Missouri, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979), or Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). Rather, members of a class of jurors were permitted to decline to serve in this case because of the substantial hardship service would create. Furthermore, we find no evidence that appellant was denied a fair and impartial jury.

ASSISTANCE OF COUNSEL

The Sixth and Fourteenth Amendments of the United States Constitution guarantee a criminal defendant the right to effective assistance of counsel. Appellant claims that his trial counsel was ineffective in five areas. We consider each separately.

1. Trial counsel moved to join the conspiracy trial to the murder trial.

When trial counsel's motion in limine to preclude evidence of the conspiracy at the murder trial failed, he moved to join the conspiracy to the murder trial. Appellant was convicted of the conspiracy at the time he was convicted of the murder; the conspiracy conviction was thereafter used as an aggravating circumstance in sentencing appellant to death on the murder charge. See A.R.S. § 13-703(F)(1). Appellant urges us to find trial counsel's assistance to be ineffective concerning this matter. We note that the only possible prejudice to appellant from joinder was in the use of the conspiracy conviction as an aggravating circumstance. The trial court had held that the evidence used to

prove the conspiracy would be admissible at the murder trial to prove conscicusness of guilt of the murder. Because we hold below that the conspiracy conviction as a matter of law does not fit within the language of A.R.S. § 13-703(F)(1), we need not consider the merits of this issue.

2. Taped conversation between appellant and Alvarez

Before reaching the merits of appellant's argument, we find it necessary to discuss what standard to apply in determining whether counsel's assistance has been ineffective. The present test in Arizona for ineffective assistance of counsel is whether "the representation by a defendant's lawyer was so ineffective that the proceedings were reduced to a farce, sham or mockery of justice." State v. Williams, 122 Ariz. 146, 150, 593 P.2d 896, 900 (1979). Appellant urges us to abandon that standard in favor of the Ninth Circuit Court of Appeals' "reasonably competent and effective representation" standard. See, e.g., Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978), cert. denied, 440 U.S. 974 (1979). As noted in Williams, the farce, sham, or mockery standard has come under increasing attack, and one member of our Court has explicitly suggested abandoning it in favor of the Ninth Circuit standard. See Williams, 122 Ariz. at 154-55, 593 P.2d at 904-05 (specially concurring opinion). But regardless of the standard we apply to appellant's case, we find trial counsel's assistance effective.

After appellant had confessed the murder to Alvarez and after he had solicited Alvarez' help in the plot to murder the witnesses against him, Alvarez contacted the county attorney's office while at the county hospital for knee surgery. This was the first notice of the conspiracy received by law enforcement personnel.

Two county attorneys, who were the prosecutors for appellant's murder charges, an investigator from the county attorney's office, and a detective from the Tucson Police Department, who had investigated the murder charges, met with Alvarez at the hospital. They had Alvarez, during his stay at the hospital, call appellant at the jail, and they taped the conversation with Alvarez' consent. The conversation, which concerned only the conspiracy, was admitted into evidence at trial.

The parties do not dispute that at the time of the taped conversation, Alvarez was working as a government agent. Further, appellant at this time had been indicted only for the murder charges but not the conspiracy. Counsel had been appointed to represent him on the murder charges.

Appellant argues that trial counsel failed to render effective assistance of counsel in that he did not object to admission of the taped statement on the basis of Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). Massiah held that a defendant's Sixth Amendment right to counsel is violated when, after indictment, the police obtain incriminating statements, directly or through agents, from the defendant without defense counsel's permission. Such statements are subject to an exclusionary rule.

The United States Supreme Court recently applied Massiah in United States v. Henry, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980). In that case, the Court held that the Sixth Amendment is also violated when the police use a paid informant-prisoner to surreptitiously elicit incriminating information from a jailed defendant when the information deals with the crime for which the defendant is being held. Accord State v. Berry, 592 S.W.2d 553

(Tenn. 1980), cert. denied, ____U.S. ____, ____S.Ct. ____(1981). Henry found Massiah applied whether the informant actively interrogated the defendant or merely engaged in conversation.

What distinguishes the instant case from Massiah and Henry is that the information elicited concerned only crimes for which the appellant had not yet been indicted. Because appellant had not yet been indicted for conspiracy, his Sixth Amendment right to counsel had not yet attached for the conspiracy charge. Therefore, if the taped conversation had been admitted at a trial where conspiracy was the only charge, there would have been no Sixth Amendment violation. See United States v. Hinton, 543 F.2d 1002 (2d Cir.), cert. denied sub nom. Carter v. United States, 429 U.S. 980 (1976); United States v. Boffa, 89 F.R.D. 523 (D. Del. 1981); United States v. Diamond, 492 F.Supp. 583 (D. Md. 1980); United States v. Rosner, 352 F. Supp. 915 (S.D.N.Y. 1972), aff'd, 516 F.2d 269 (2d Cir. 1975).

The problem in the instant case, however, is that although the taped statement was used to prove the conspiracy, the conspiracy was used to prove consciousness of guilt of the murder.[3/] The issue before us, then, is whether a Sixth Amendment violation occurs when a police agent surreptitiously elicits information from an indicted defendant if the information concerns an unindicted charge but is used to prove the indicted charge. We hold that under Massiah and Henry, there is a Sixth Amendment violation when this situation occurs.[4/]

3/ In fact, trial counsel moved for joinder of the conspiracy to the murder charges only after the trial judge ruled that evidence of the conspiracy would be admissible to prove consciousness of guilt of the murder.

4/ Our research has revealed only one case on point -- Crawford

We realize that the police have a need to investigate ongoing crime. Further, we note that there is no right to counsel while perpetrating a crime. The purpose of the Sixth Amendment's right to counsel is to protect a client's constitutional rights, not to conceal crimes as the client commits them. Hence, we find no Sixth Amendment error in the police eliciting incriminating information on uncharged crimes from a defendant who is without the benefit of counsel. But we hold that the state may not subsequently use that information to prove a crime for which the defendant's right to counsel had attached at the time the information was

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4/ (Continued from previous page:)
v. State, 377 So.2d 145 (Ala. Crim. App.), aff'd., 377 So.2d 159 (Ala. 1979), vacated and remanded, 448 U.S. 904 (1980). In that case, a jailed defendant awaiting trial for murder solicited a fellow prisoner to assassinate the prosecution's chief witness. The prisoner went to the state and, for no benefit to himself, volunteered his aid in preventing the assassination. The state wired him, and he and the defendant engaged in a conversation where the only crime discussed was the plot to kill the witness. At defendant's murder trial, these statements were offered to prove consciousness of guilt. The Alabama courts upheld admission of the statements because they involved a crime separate from the crime for which the defendant was being held, the defendant initiated the conversation, and the Sixth Amendment did not confer the right to counsel during commission of a crime. The United States Supreme Court vacated and remanded Crawford in light of its decision in Henry. For the reasons stated in the text, we believe Crawford is no longer a proper statement of the law.

elicited. It does not matter whether the state, when it gathered the information, intended to use it to prove the unindicted or the indicted crimes. The Sixth Amendment right to counsel does not turn on the state's motives. "Anything less * * * might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.'" Massiah, 377 U.S. at 204, 84 S.Ct. at 1202, 12 L.Ed.2d at 249.

By allowing admission of the conversation with Alvarez, who then was a government agent,[5/] to prove a crime for which his client's right to counsel had attached, trial counsel erred. But although we disapprove of trial counsel's conduct in this regard, we do not find his assistance ineffective.

When an attorney's conduct does not prejudice the defendant, the attorney's assistance is not ineffective under either the farce, sham, or mockery standard or the reasonably competent criminal attorney standard. We do not find reversible error under the particular facts of this case; hence, we do not find trial counsel's assistance ineffective. Even though appellant's Sixth Amendment right to counsel was infringed by admission of the conversation, constitutional error is not reversible if it is harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The error in the instant case was harmless beyond a reasonable doubt. The

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5/ All the conversations between Alvarez and appellant before Alvarez became a government agent were admissible because the state did not infringe on appellant's right to counsel at that time. See United States v. Calder, 641 F.2d 76 (2d Cir.), cert. denied, ____ U.S. ____, 101 S.Ct. 1984 (1981).

taped telephone conversation between Alvarez and appellant was not incriminating on its face[6/] and the prosecutor made only a brief reference to it in closing argument. The conversation did little, if anything, to prove the conspiracy charge; it did even less to prove appellant's consciousness of guilt of the murder.[7/] Moreover, the evidence of appellant's guilt of murder was overwhelming. Two eyewitnesses, the McCormack daughters, testified against appellant. A neighbor of the McCormack's identified appellant's truck as the one in the alley behind the McCormack residence at the time appellant said he and his truck were at his residence. The knife used to commit the murder and the gasoline can used to fuel the fire were seized from appellant. Also, appellant's fingerprint was found on a delayed ignition device found at the scene of the crimes. Thus, even if trial counsel erred in failing to object to admission of the taped conversation, we find such error to be harmless beyond a reasonable doubt.

3. Notes between appellant and his wife

During the course of the conspiracy, appellant wrote various notes to his wife concerning the murder plot. Trial counsel did not move to exclude these notes and, in fact, used them as the basis of the conspiracy defense. Appellant testified that Alvarez coerced appellant into joining the conspiracy. Trial counsel argued

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6/ In fact, we find that the trial court could have excluded it under Rule 402, Rules of Evidence, as irrelevant. Failure to do so, however, was not fundamental error.

7/ The trial court found that the conversation "lends support to defense counsel's argument that Alvarez was fabricating for his own benefit."

to the jury that the notes proved that appellant and his wife were merely pretending to go along with Alvarez to avoid physical reprisals.

Appellant now urges us to find trial counsel's assistance ineffective for failure to object to the notes on the basis of the marital communications privilege. See A.R.S. § 13-4062(A). He claims that trial counsel was forced to use the notes to defend the conspiracy charge solely because the notes were not suppressed.

Our review of the record indicates that trial counsel always planned to use the notes to establish a defense. Appellant himself testified that the notes verified his defense. We do not question whether this was the best trial strategy. Mere errors in trial strategy do not constitute ineffective assistance of counsel. State v. Flewellen, 127 Ariz. 342, 621 P.2d 29 (1980). Trial counsel was not ineffective for failing to move to exclude the notes.

4. Adequacy of trial preparation

Our study of the record shows that in preparing for trial, appellant's trial counsel interviewed over seventy people, discussed trial tactics with several experienced attorneys, and studied arson and murder investigation. He also filed numerous pretrial motions, including motions to appoint a handwriting expert, to preclude evidence of appellant's wife's assault on Manuelita McCormack, to suppress gruesome photographs, to preclude certain physical evidence, to determine the competence to testify of Patricia and Bernice McCormack, and to exclude evidence of the conspiracy to murder.

Nevertheless, appellant alleges ineffective assistance in trial counsel's preparation. He believes that trial counsel should have investigated whether Manuelita McCormack was strangled and

whether gasoline was used to start the fire at the McCormack residence. Appellant points to evidence uncovered by appellate counsel proving no strangulation and no use of gasoline. He then constructs a chain of hypotheticals based on this proof and concluding in impeachment of some of the witnesses against him. We find the proof uncovered by appellate counsel to be inconclusive and the hypothetical impeachment to go to collateral issues. Trial counsel's assistance also was not ineffective in this area.

5. Miscellaneous claims

To support his charge of ineffective assistance of counsel, appellant lodges a few miscellaneous complaints. He states that trial counsel was unaware the first degree murder indictment could include felony-murder, he did not ask for an instruction that good character alone can create a reasonable doubt, and his conduct resulted in a jury with an unbalanced sexual composition. Appellant does no more than merely state these facts; he does not discuss how these alleged failures resulted in ineffective assistance or prejudice to his case. Furthermore, appellant never raised these three particular points until he appealed to this Court. We are unable to conclude from the record that there was fundamental error concerning any of these three points. Thus, appellant waived these arguments on appeal by failing to make a timely objection.[8/] E.g. State v. Mata, 125 Ariz. 233, 609 P.2d

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8/ Appellate counsel jointly represented appellant at sentencing and at the motion to vacate judgment. Had appellate counsel's representation begun only on appeal, we might attribute the failure to timely raise these claims to trial counsel's ineffective assistance. We do not find appellate counsel's assistance ineffective,

48 (1980); State v. Newman, 122 Ariz. 433, 595 P.2d 665 (1979).

TESTIMONY OF FEAR OF APPELLANT

Bernice McCormack was eight years old at the time she testified. She related how appellant murdered her mother, stabbed her sister, stabbed her, and then tried to burn down the house while she and her siblings were still inside. During cross-examination, her credibility was challenged through inconsistencies between her testimony and prior statements. She also admitted that she remembered the events surrounding the crime better near the time of the crime than at trial.

At the end of the redirect examination, the following dialogue occurred between one of the prosecutors and Bernice:

> "Q. Bernice, you said it was kind of hard to remember or it's gotten harder to remember now as compared to just after the fire. Why is that?
>
> "A. I don't know.
>
> "Q. You're pretty scared today.
>
> "A. Yes.
>
> "Q. What are you afraid of, is there something or somebody in the courtroom today that you're afraid of?
>
> "A. (Witness nods.)
>
> "Q. Who is it?
>
> "A. (Witness points.)"

Bernice pointed to appellant and began to cry. Trial counsel

8/ (Continued from previous page:)
and he is jointly responsible for failure to timely raise these issues before appeal. Waiver of these issues, therefore, was not the result of ineffective assistance of counsel.

immediately moved for a mistrial on the ground that this dialogue was too inflammatory. On appeal, appellant argues that the trial court erred in not granting the mistrial motion.

We believe the questions and answers were proper to rehabilitate the witness, although neither party views the issue in this manner. Even if evidence has an inflammatory nature, if there is a legitimate, rehabilitative purpose that outweighs the prejudicial effect, the evidence is admissible in the trial court's discretion. Cf. People v. Burke, 52 Ill.App.2d 159, 201 N.E.2d 636 (1964) (prior sexual misconduct of defendant towards witness admissible to explain witness' admitted hatred of defendant); State v. Harman, 270 S.E.2d 146 (W. Va. 1980) (defendant's molestation of his eleven-year old stepdaughter admissible to explain witness' expressed anger at defendant). In the instant case, given the nature of the acts to which Bernice testified appellant committed, we find little prejudice in her also testifying that she was afraid of appellant. Because of trial counsel's effective cross-examination, the evidence did have a substantial, legitimate, rehabilitative purpose. The trial court did not abuse its discretion in admitting the evidence and proceeding over appellant's motion for mistrial.

AMENDMENT TO CONSPIRACY INSTRUCTIONS

The conspiracy indictment charged appellant with plotting to murder six of the potential witnesses against him -- the murder victim's three children, sister, husband, and a female friend of the husband. Near the end of its deliberations, the jury sent the trial judge a note asking whether it could convict appellant of conspiracy if it found him guilty of conspiracy to murder fewer than all six people. The judge consulted with the attorneys and

then gave the jury further instruction. He told the jury that it could convict for conspiracy if it found that appellant conspired to murder any of the six named people. He also gave the jury an interrogatory inquiring, in the event it found appellant guilty, against which of the six people it found appellant to have conspired. The jury found appellant guilty of conspiring to murder the three children only.

The issue appellant raises is whether the amended instruction changed the nature of the indictment and thereby violated his right to due process of law. Ex parte Bain, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887), stands for the rule that a trial judge's amendment of a felony indictment violates the defendant's right to be indicted for a felony only by a grand jury. Appellant's reliance on Bain is misplaced.[9/] First, the Grand Jury Clause has

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9/ Appellant also relies on People v. McChristian, 18 Ill.App.3d 87, 309 N.E.2d 388 (1974), aff'd, 60 Ill.2d 37, 322 N.E.2d 804 (1975). In that case, the defendant was charged with conspiring to murder a number of people at the same time by firing a gun into a crowded automobile. The court held that to convict, the state had to prove that the defendant intended to kill all the people in the vehicle. As charged, the defendant had to intend to kill all the riders at the same time or he did not intend to kill anyone at all. In the instant case, appellant was charged with conspiring to murder six people, but he was not charged with plotting to kill them all in one occurrence, e.g., by luring them all together and exploding a bomb. Thus, we do not reach the question whether McChristian will be followed in Arizona; rather, we hold it does not apply to appellant's case.

never been incorporated into the Due Process Clause of the Fourteenth Amendment. Therefore, it does not apply to state prosecutions. Second, the trial court did not amend the indictment but rather gave the jury a correct instruction on conspiracy law.

Appellant and Alvarez made one agreement -- to kill the witnesses against appellant. There was evidence of an intent by appellant to aid the commission of murdering the witnesses. Because this was a conspiracy to commit murder, no overt act was required. Therefore, there was a conspiracy under A.R.S. § 13-1003(A).

The fact that the conspiracy involved murdering more than one person makes it a single conspiracy with multiple objects under A.R.S. § 13-1003(C). When an indictment charges a single conspiracy with multiple objects, a conviction will stand if the prosecution proves the defendant guilty of conspiring to commit any one of the objects. See, e.g., United States v. Carman, 577 F.2d 556 (9th Cir. 1978); United States v. Papadakis, 510 F.2d 287 (2d Cir.), cert. denied, 421 U.S. 950 (1975); United States v. Grizaffi, 471 F.2d 69 (7th Cir. 1972). The trial court's instruction that the jury could convict appellant of conspiracy if it found he conspired to murder any one of the six potential victims was, therefore, a correct statement of the law.

SINGLE CONSPIRATOR

The state alleged that the conspiracy originally involved three conspirators -- appellant, his wife, and Alvarez. At the time of appellant's sentencing, appellant's wife's case had been dismissed with prejudice and Alvarez had transactional immunity for his testimony against appellant. Hence, from that time, appellant was the only conspirator who could be convicted.

The law in Arizona under the pre-1978 criminal code was that no one conspirator's conviction could stand if no coconspirator could be convicted. See Eyman v. Deutsch, 92 Ariz. 82, 373 P.2d 716 (1962). Contrary to appellant's position, the law changed with the new criminal code.

A.R.S. § 13-1006(A) provides:

> "It is not a defense to a prosecution for * * * conspiracy * * * that a person * * * with whom the defendant conspired could not be guilty of committing the offense because: * * * (2) Such person is not criminally responsible as defined in chapter 5 of this title, or has an immunity to prosecution or conviction for the commission of the offense."

Section 1006 adopted the elements of § 606 proposed by the Arizona Criminal Code Commission. The commentary to § 606 states:

> "Section 606, new to Arizona, specifically denies to a defendant the use of certain defenses often invoked under the bilateral view of conspiracy, solicitation and facilitation. Since this draft takes a unilateral view of these offenses, any party can now be subjected to the criminal justice system irrespective of the responsibility of others. Existing law in Eyman v. Deutsch, 92 Ariz. 82, 373 P.2d 716 (1962) is now changed. The immunity, minority, incapacity, nonprosecution or acquittal of an accomplice has no bearing on

> the guilt of other participants. An individual who manifests a desire to further his or her criminal objectives by joining with others is hardly less responsible because he or she joined with an incompetent, an undercover agent, a person subsequently granted immunity or one otherwise incapable of being prosecuted for that crime."

Arizona Criminal Code Commission, Arizona Revised Criminal Code 86 (1975).

Under A.R.S. §§ 13-1003, -1006, the conviction of any conspirator is now independent of the conviction vel non of any coconspirator. Appellant's conspiracy conviction is not void on the basis that neither coconspirator can be prosecuted.

CONSTITUTIONALITY OF ARIZONA'S DEATH PENALTY PROCEDURE

Appellant raises several challenges to Arizona's current procedure for imposing the death penalty.

1. "[E]specially heinous, cruel or depraved."

Relying on Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), appellant argues that this Court has interpreted the "especially heinous, cruel, or depraved" language of A.R.S. § 13-703(F)(6) in an unconstitutionally broad and vague manner. We disagree.

Godfrey involved Georgia's aggravating circumstance of a murder that is "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Ga.Code Ann. § 27-2534.1(b)(7). The United States Supreme Court found that the Godfrey murder did not involve torture or aggravated battery as the Georgia Supreme Court had interpreted those terms. Also, the Court found

that the Godfrey murder was not so depraved as to set it apart from the "usual" first degree murder. Therefore, Georgia erred in imposing the death penalty on Godfrey based on this aggravating circumstance.

Godfrey contains two rules. When a state has an aggravating circumstance that is the analog of a heinous, cruel, or depraved murder, the state: (1) must objectively define the terms used; and (2) must not use the circumstance as a catch-all for those first degree murders where no other aggravating circumstance applies. Arizona follows both of these rules.

We have objectively defined the relevant terms: a murder is "heinous" if "hatefully or shockingly evil;" "cruel" if "disposed to inflict pain esp. in a wanton, insensate or vindictive manner: sadistic;" and "depraved" if "marked by debasement, corruption, perversion or deterioration." State v. Knapp, 114 Ariz. 531, 543, 562 P.2d 704, 716 (1977), cert. denied, 435 U.S. 908 (1978). Cruelty focuses on the sensations of the victim before death, depravity focuses on the murderer's state of mind, and heinousness focuses on society's view of the murder as compared to other murders. To use this aggravating circumstance, the trial court must find that the murder is especially heinous, cruel, or depraved. State v. Lujan, 124 Ariz. 365, 604 P.2d 629 (1979). We believe these standards satisfy Godfrey and that the especially cruel, heinous, and depraved aggravating circumstance has not been defined in an unconstitutionally broad and vague manner.

2. Mitigating circumstances

Appellant also challenges Arizona's death penalty procedure on the grounds that the enumerated mitigating circumstances in A.R.S. § 13-703(G) are too ambiguous and that neither the statute

nor this Court has adequately defined when mitigating circumstances are "sufficiently substantial to call for leniency." We have previously considered these arguments and rejected them in State v. Mata, 125 Ariz. 233, 609 P.2d 48 (1980).

3. Review procedure

Appellant's final challenge to the constitutionality of Arizona's death penalty procedure is that it does not provide for a "proportionality review" as envisioned by Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Gregg requires a review of the proportionality of all crimes where the death penalty could be imposed so that the death penalty is not applied arbitrarily or capriciously.

This Court performs that function. We review all cases where the death penalty could be imposed. A.R.S. § 13-4031. The trial court is required to state with particularity its findings as to the aggravating and mitigating circumstances. A.R.S. § 13-703(D). Finally, this Court independently reviews the evidence presented at the aggravation-mitigation hearing. State v. Richmond, 114 Ariz. 186, 560 P.2d 41 (1976), cert. denied, 433 U.S. 915 (1977); State v. Watson, 129 Ariz. 60, 628 P.2d 943 (1981).

Our Court has performed the proportionality review as described above. For example, we found a murder to be especially depraved where the defendant burned to death his infant children, State v. Knapp, 125 Ariz. 503, 611 P.2d 90 (1979), and especially heinous, cruel, or depraved where the defendant and his accomplices successively raped the victim, beat her with their fists, struck her head against the cement floor, and eventually cut her throat, State v. Mata, 125 Ariz. 233, 609 P.2d 48, cert. denied, 449

U.S. 921 (1980). In those cases we affirmed the sentence of death. On the other hand, this Court has found a premeditated shooting of the defendant's wife or of a drug seller was not especially heinous, cruel, or depraved. State v. Madsen, 125 Ariz. 346, 609 P.2d 1046, cert. denied, 449 U.S. 873 (1980); State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979). We reduced the death penalty to life imprisonment in those cases. We will continue to review all potential death penalty cases to insure that the penalty is imposed only in those cases where the involved murder or defendant differs from the norm. See State v. Watson, 129 Ariz. 60, 628 P.2d 943 (1981).

PROPRIETY OF DEATH PENALTY IN THE INSTANT CASE

Appellant's final set of claims relate to the propriety of imposing the death penalty in the instant case. He raises seven distinct issues.

Before proceeding to the merits of appellant's arguments, we note it is unclear under which death penalty statute appellant was sentenced. When appellant committed the crime in December, 1978, the death penalty statute as construed by this Court in State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), cert. denied, 440 U.S. 924 (1979), was in effect. The Legislature amended A.R.S. § 13-703(G) in May, 1979 to conform with our holding in Watson. Appellant was sentenced in October, 1979.

The trial court correctly found that the sentencing procedure would be identical under either statute but did not specify which statute it used. To clarify the record, we hold that appellant was sentenced under A.R.S. § 13-703 as amended in May, 1979. Because appellant faced the same penalty and procedure under either statute, there is no constitutional defect in sentencing appellant under a statute not yet in effect when he committed

the crime. See Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977).

1. Notice of aggravating circumstances

Based on the due process clause of the Fourteenth Amendment to the United States Constitution, appellant argues that he was entitled to notice of the aggravating circumstances that would be used to seek the death penalty and their underlying factual bases. We agree but find that appellant was given adequate notice.

"[T]he defendant is entitled to know the aggravating circumstances which the prosecution will seek to prove sufficiently in advance of court proceedings so that reasonable opportunity to prepare will be afforded." State v. Sonnier, 379 So.2d 1336, 1356 (La. 1979). Thus, due process in an A.R.S. § 13-703 hearing requires of the prosecution three duties: (1) disclosure of the aggravating circumstances the state will seek to prove; (2) disclosure of the evidence the state will use; and (3) disclosure sufficiently in advance of the hearing that the defendant will have a reasonable opportunity to prepare rebuttal. The prosecution in the instant case performed all three duties.

The prosecution notified both appellant and the trial court of what aggravating circumstances it would seek to prove. It filed a memorandum on September 10, 1979 indicating it would seek to prove the aggravating circumstances in A.R.S. § 13-703(F)(3) and (6). On October 2, 1979, it filed a supplemental memorandum disclosing that it would also argue the existence of the aggravating circumstance in A.R.S. § 13-703(F)(1).

The prosecution also met the disclosure duty as to what evidence it would use at the aggravation-mitigation hearing. A.R.S. § 13-703(C) provides, "Evidence admitted at the trial, relating

to * * * aggravating or mitigating circumstances, shall be considered without reintroducing it at the sentencing proceeding." Thus, appellant was on notice that any evidence adduced at trial could be used to prove the aggravating circumstances. As to any evidence not produced at trial, the prosecution must disclose such additional evidence to the defendant. The prosecution made such additional disclosure in the instant case.

Finally, the prosecution in the instant case made timely disclosure. Appellant received notice of the aggravating circumstances in A.R.S. § 13-703(F)(3) and (6) and disclosure of additional evidence some three weeks before the aggravation-mitigation hearing. The prosecution did not notify appellant until two days before the hearing that it would seek to use his concurrent conspiracy conviction as a prior conviction under A.R.S. § 13-703(F)(1). But we hold that this was also timely because appellant could have offered no rebuttal, did not ask for a continuance of the hearing, and was not prejudiced.

Therefore, appellant had due process concerning notice of the aggravating circumstances.

2. Use of appellant's wife's testimony from her conspiracy trial.

At the aggravation-mitigation hearing, the state introduced a transcript of appellant's wife's testimony at her trial for her part in the conspiracy. The transcript was used to rebut appellant's mitigation testimony that he was of good character, had been a good father, and had no prior criminal record. His wife had testified that appellant had beaten her a dozen times, pointed a gun at her, and had an affair with Manuelita McCormack. His wife did not herself testify at the aggravation-mitigation hearing.

Appellant argues that admission of this testimony violated his confrontation clause rights under the Sixth and Fourteenth Amendments to the United States Constitution.

We must first decide whether the transcript was admissible under A.R.S. § 13-703(C) before we reach appellant's confrontation clause argument. A.R.S. § 13-703(C) provides:

> "Any information relevant to any of the mitigating circumstances set forth in subsection G of this section may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials; but the admissibility of information relevant to any of the aggravating circumstances set forth in subsection F of this section shall be governed by the rules governing the admission of evidence at criminal trials. * * * The prosecution and the defendant shall be permitted to rebut any information received at the hearing * * *."

A.R.S. § 13-703(C) defines the standards for admissibility of evidence directly proving aggravating or mitigating circumstances. It also states that both the prosecution and defendant may rebut what the other side tried to prove. But what § 703(C) fails to do is to define the standards for admissibility of rebuttal evidence.

We partially fill this interstice by holding that under § 703(C), any relevant evidence may be used to rebut the defendant's

mitigating circumstances regardless of its admissibility at trial.[10/] This holding reflects the legislative intent of our current criminal code, see A.R.S. § 13-101, and is consonant with the idea "that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial." Williams v. New York, 337 U.S. 241, 247, 69 S.Ct. 1079, 1083, 93 L.Ed. 1337, 1342 (1949).

Of course, the fact that evidence is admissible within the meaning of A.R.S. § 13-703(C) does not necessarily indicate compliance with a defendant's constitutional rights. Therefore, we consider appellant's confrontation clause claim.

We begin our analysis by observing that by its terms, the confrontation clause applies only to "trials" and not to sentencing hearings. Appellant grounds his claim, however, on our opinion in State v. Hanley, 108 Ariz. 144, 493 P.2d 1201 (1972). Hanley pled guilty to rape. At the aggravation-mitigation hearing, the two victims testified for the state to prove aggravating circumstances. The trial court precluded Hanley's cross-examination of the victims. In reversing the sentence, we said:

> "In the instant case, the defendant had a right to show any evidence which would mitigate the seriousness of the crime to which he had pleaded guilty. Undue restrictions on the right to cross-examine strike at the very heart of the adversary system:
>
> "'* * * [a] denial of cross-examination without waiver * * * would be constitutional

---

10/ We decline to consider at this time the standard of admissibility for evidence rebutting the prosecution's aggravating circumstances.

error of the first magnitude and no amount of showing of want of prejudice would cure it.' [citations omitted]"

Id. at 148, 493 P.2d at 1205.

We adhere to Hanley but find it inapplicable to the instant case. Hanley precludes denial of a defendant's right to produce mitigating evidence through cross-examination. Appellant, however, was denied the opportunity to rebut rebuttal evidence through cross-examination. He does not argue nor does the record show that he could have produced additional mitigation evidence through cross-examination of the state's rebuttal witness. Given the sentencing court's need for all relevant evidence to make an informal, individualized decision, we find no error in the instant case.

3. The same judge tried appellant, tried appellant's wife, and then sentenced appellant

After appellant's wife testified at her conspiracy trial, the state moved to dismiss, with prejudice, the charges against her. The prosecutor stated that he had a reasonable doubt as to her guilt. The trial judge, who had tried appellant's case and who later sentenced appellant, said, "[Y]ou can add the Court to that, if you want to."

Appellant alleges that the court's statement in his wife's case shows that the court was predisposed to believe his wife's testimony and version of the conspiracy and disbelieve him. The record does not support this charge. We have searched the entire record and find no evidence of the trial court being biased against appellant. We read the statement in appellant's wife's trial as showing only that the court agreed that there was a reasonable doubt as to the wife's guilt.

4. Grave risk of death to others

For the death penalty to be imposed, the state must prove beyond a reasonable doubt the existence of at least one aggravating circumstance. State v. Jordan, 126 Ariz. 283, 614 P.2d 825 (1980). The trial court found that in committing the murder, appellant knowingly created a grave risk of death to others, an aggravating circumstance under A.R.S. § 13-703(F)(3).

The basis for the trial court's finding was that appellant knowingly created a grave risk of death to the three McCormack children when he tried to dispose of Manuelita McCormack's body by burning down the house. Appellant had stabbed two of the children and told all three to stay in the house until the fire department arrived. Appellant points out that the state did not prove beyond a reasonable doubt that Mrs. McCormack was alive when the fire started. He then urges us to find as a matter of law that once the murder victim is dead, nothing the murderer does thereafter can be considered part of the "commission of the offense" within the meaning of A.R.S. § 13-703(F)(3). We decline to do so.

Concealment of the murder is legally part of the murder transaction. Cf. State v. Richmond, 114 Ariz. 186, 560 P.2d 41 (1976) (for purposes of the felony-murder rule, flight from the felony is legally a part of the felony transaction), cert. denied, 433 U.S. 915 (1977). "[W]e will not hold a stopwatch on the events" of the murder "to avoid the clear intent of the legislature in enacting" A.R.S. § 13-703(F). See Richmond, 114 Ariz. at 190, 560 P.2d at 45. Appellant's actions squarely fit within the aggravating circumstance of knowingly creating a grave risk of death to others.

5. Especially heinous, cruel, or depraved

The trial court made the following findings in its special verdict:

> "The Court further finds that the aggravating circumstance set forth in Subparagraph 6 does exist. The defendant committed the offense in an especially cruel, heinous, and depraved manner.
>
> "In that regard the Court finds that the defendant, in the home of the victim, a defenseless woman, inflicted upon her multiple stab wounds in the neck and chest areas. It was impossible to determine the exact number of stab wounds because of the condition in which the victim's body was recovered. The defendant left the victim lying on the floor in the living room. It's impossible to determine if she was dead at that time or not. The defendant then took Patricia McCormack, age 9, from her bedroom into the living room and stabbed her with the same knife he had used on her mother. She was then put in another, different bedroom, and the defendant then got Bernice McCormack, age 8, and stabbed her, again with the same knife, and put her with Patricia.
>
> "He next poured gasoline next to, on or upon the body of the mother and in other areas of the home so as to prevent the children from leaving when the fire ignited.

"He then went to the bedroom where his godson Charles McCormack III was sleeping and, using clothing, attempted to start a fire there without accelerant.

"He then returned to the mother and ignited the accelerant and left the home blazing, with the victim and the three young children still in the home."

We disagree with the trial court that this murder was especially cruel as defined in State v. Knapp, 114 Ariz. 531, 562 P.2d 704 (1977), cert. denied, 435 U.S. 908 (1978). The state did not prove beyond a reasonable doubt that the victim suffered during commission of the murder. We agree with the remainder of the trial court's findings, however, and hold that this murder was especially heinous and depraved as defined in Knapp.[11/] Cf. State v. Bishop, 127 Ariz. 531, 622 P.2d 478 (1980); State v. Knapp, supra. Beyond a reasonable doubt, this murder was far more heinous and depraved than the norm of first degree murders.

6. The conspiracy conviction

Appellant raises several challenges to the use of the conspiracy conviction as an aggravating circumstance. We need only consider one of them.

A.R.S. § 13-703(F)(1) states:

11/ Although many of the facts supporting the finding concern what appellant did to the children rather than the murder victim, circumstances surrounding the murder are relevant to determining "the murderer's mental state at the time of the killing." State v. Lujan, 124 Ariz. 365, 372, 604 P.2d 629, 636 (1979).

"Aggravating circumstances to be considered shall be the following:

"1. The defendant has been convicted of another offense in the United States for which under Arizona Law a sentence of life imprisonment or death was imposable.

* * *"

We note that neither the statute nor legislative intent indicates clearly the latest time at which a conviction must be entered to come within the meaning of A.R.S. § 13-703(F)(1). We therefore give the words what we believe to be their plain meaning: to be an aggravating circumstance under A.R.S. § 13-703(F)(1), a prior conviction must be entered prior to the time for which jeopardy attaches on the first degree murder charge that subsequently results in a § 703 sentencing hearing. Because appellant's conspiracy conviction was not entered until the conclusion of the murder trial, it should not have been considered as an aggravating circumstance under A.R.S. § 13-703(F)(1).

7. Mitigating circumstances

As is required by A.R.S. § 13-703(D), the trial court gave a special verdict on the murder conviction which set forth a detailed examination of mitigating circumstances. The court found that the length of the jury deliberations, appellant's ability to distinguish right from wrong, appellant's alleged duress, and appellant's alleged lack of intent to kill were not mitigating circumstances under the facts of this case. The court did find these "possible" mitigating circumstances: (1) appellant's lack of a prior criminal record; (2) appellant's intelligence; (3) appellant's standing as a responsible citizen;

(4) appellant's standing as a good father; (5) appellant's activities in jail (offset by his spending the first three months of incarceration conspiring to kill the witnesses against him); and (6) the likelihood of recidivism (offset by the conspiracy). The court concluded:

> "These factors indicated above, which might ordinarily constitute mitigating circumstances are not such by reason that the facts that the Court learned principally from the trial and the testimony of the defendant's wife in her trial, that evidence disclosed and the Court finds that the defendant was an adulterer, a violent wife beater, and a liar."

The Court imposed the death penalty.

Appellant argues that the trial court erred in not finding the mitigating circumstances proffered by appellant. Our reading of the trial court's verdict indicates that whatever mitigation evidence appellant offered, it was not sufficiently substantial to call for leniency. We have independently reviewed the evidence in a painstaking manner, and we agree.

CONCLUSION

We have reviewed the entire record for fundamental error pursuant to A.R.S. § 13-4035. We affirm all the convictions in this case. We hold that appellant's conspiracy conviction is not an aggravating circumstance for the murder conviction within the language of A.R.S. § 13-703(F)(1). Nevertheless, we find that two aggravating circumstances were proved beyond a reasonable doubt and that the mitigating circumstances are not sufficiently substantial to call for leniency. Therefore, the sentence of death

was properly imposed. We also affirm the sentences on all other counts.

The judgment and sentences are affirmed.

FRANK X. GORDON, JR.
Justice

CONCURRING:

FRED C. STRUCKMEYER, JR.
Chief Justice

WILLIAM A. HOLOHAN
Vice Chief Justice

JACK D. H. HAYS
Justice

JAMES DUKE CAMERON
Justice

PIMA COUNTY PUBLIC DEFENDER
45 WEST PENNINGTON STREET, THIRD FLOOR
TUCSON, ARIZONA 85701
TELEPHONE: [602] 791-3280

APPENDIX II

ORDER DENYING PETITIONER'S
MOTION FOR REHEARING and
MANDATE OF THE ARIZONA
SUPREME COURT

S. ALAN COOK
CLERK

Supreme Court
STATE OF ARIZONA
201 WEST WING
CAPITOL BUILDING
(602) 255-4536
Phoenix 85007

ANNA L. CATES
CHIEF DEPUTY CLERK

'82 JAN 14 AM11:52

PIMA COUNTY
PUBLIC DEFENDER

January 13, 1982

STATE OF ARIZONA,

Appellee,

vs.

IGNACIO ALBERTO ORTIZ,

Appellant.

Supreme Court
No. 4818

Pima County
Nos. CR-00284
and CR-00767
(Consolidated)

The following action was taken by the Supreme Court of the State of Arizona on January 12, 1982 in regard to the above-entitled cause:

"ORDERED: Motion for Rehearing [State] - DENIED.

FURTHER ORDERED: Motion for Rehearing [Ortiz] - DENIED."

Copy of Order Affirming Judgment and Sentences enclosed.

S. ALAN COOK, Clerk

By Kathleen E Kempley
Deputy Clerk

TO:

Frederic J. Dardis, Pima County Public Defender, 45 West Pennington, Third Floor, Tucson, Arizona 85701 Attn: Donald S. Klein
Hon. Robert K. Corbin, Attorney General, 1275 West Washington, Phoenix, Arizona 85007 Attn: Jack Roberts
Stephen D. Neely, Pima County Attorney, 111 West Congress, Tucson, Arizona 85701
Ignacio Alberto Ortiz, Box B-40234, Arizona State Prison, Florence, Arizona 85232

IN THE SUPREME COURT OF THE STATE OF ARIZONA

STATE OF ARIZONA, Appellee, vs. IGNACIO ALBERTO ORTIZ, Appellant.	No. 4818 ORDER AFFIRMING JUDGMENT AND SENTENCES (MANDATE)

Appeal from the Superior Court of Pima County
Numbers CR-00284 and CR-00767
Honorable Ben C. Birdsall, Judge

Robert K. Corbin, Attorney General
by William J. Schafer III and
Jack Roberts, Assistant Attorneys General
Attorneys for Appellee

Richard S. Oseran, Former Pima County Public Defender
Frederic J. Dardis, Pima County Public Defender
by Donald S. Klein, Deputy Public Defender
Attorneys for Appellant

This cause having been heretofore submitted, and the Court having duly considered same, and being now advised in the premises, files its Opinion. It is accordingly ORDERED that the judgment and sentences of the trial court entered in the above-entitled cause be affirmed, to comply with the Opinion of this Court, attached hereto.

DONE IN OPEN COURT this 23rd day of November, 1981.

STATE OF ARIZONA
SUPREME COURT

I, S. ALAN COOK, Clerk of the Supreme Court of the State of Arizona, hereby certify the above to be a full and true copy of the Order Affirming Judgment and Sentences, made and entered in the above-entitled cause by said Court on the 23rd day of November, 1981.

IN WITNESS WHEREOF, I hereunto set my hand and affix the official seal of the Supreme Court of the State of Arizona this 13th day of January, 1982.

S. ALAN COOK, Clerk

cc:
Hon. Robert K. Corbin, Attorney General; Stephen D. Neely, Pima County Attorney; Hon. William E. Druke, Presiding Judge; Department of Corrections, Central Office; Frederic J. Dardis, Pima County Public Defender; Ignacio Alberto Ortiz; Jim I. Martin, Court Administrator for Pima County; Institutional Administrator of the Arizona State Prison.

45 WEST PENNINGTON STREET, THIRD FLOOR
TUCSON, ARIZONA 85701
TELEPHONE: [602] 791-3388

APPENDIX III

SPECIAL VERDICT ON CONVICTION OF FIRST DEGREE MURDER, FILED OCTOBER 15, 1979

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

FILED IN COURT
15 October 1979
JAMES N. CORBETT, Clerk
G McSweeney
Deputy

STATE OF ARIZONA, Plaintiff, vs. IGNACIO ALBERTO ORTIZ, Defendant.	CR - 0 0 2 8 4 SPECIAL VERDICT ON CONVICTION OF FIRST DEGREE MURDER

Pursuant to A.R.S. §13-703 the defendant having been convicted of the crime of First Degree Murder, the Court makes the following findings as to the existence or nonexistence of each of the circumstances set forth in Subsection F (aggravating circumstances) thereof, and as to the existence of any of the circumstances included in Subsection G (mitigating circumstances) thereof:

AGGRAVATING CIRCUMSTANCES

Subsection F

THE COURT FINDS that aggravating circumstances 2, 4, 5, and 7 do not exist.

THE COURT FINDS that the aggravating circumstance set forth in subparagraph 1 does exist. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment was imposable. The defendant was convicted by jury verdict on July 2, 1979, in Pima County Case No. CR-00767 of the crime of Conspiracy to Commit First Degree Murder committed on and between January 1 and March 4, 1979. That crime was punishable under Arizona law A.R.S. §13-1003 subparagraph D by a sentence of life imprisonment. First Degree Murder is a Class 1 felony.

THE COURT FINDS that the aggravating circumstances set forth in Subparagraph 3 do exist. In the commission of the offense, the defendant knowingly created a grave risk of death to other persons in addition to the victim of the offense. In this regard, THE COURT

FINDS that the defendant knew that three minor children of the victim, to wit: Patricia McCormack, Bernice McCormack, and Charles McCormack III, were in the victim's home, and that he knew them and knew their ages to be approximately nine, eight and three respectively.

THE COURT FURTHER FINDS that the defendant planned to dispose of the victim's body by committing Arson of the home with the use of gasoline as an accelerant; that because of these facts, the defendant knew that he was creating a grave risk of death to these minor children.

THE COURT FURTHER FINDS that the aggravating circumstance set forth in Subparagraph 6 does exist. The defendant committed the offense in an especially heinous, cruel and depraved manner. In this regard, THE COURT FINDS that the defendant, in the home of the victim, a defenseless woman, inflicted upon her multiple stab wounds in the neck and chest areas. It was impossible to determine the exact number of stab wounds because of the condition in which the victim's body was recovered. The defendant left the victim lying on the floor in the livingroom. It is impossible to determine if she was dead at that time or not.

The defendant then took Patricia McCormack, age 9, from her bedroom into the livingroom and stabbed her with the same knife he had used on her mother. She was then put in another different bedroom and the defendant then got Bernice McCormack, age 8 and stabbed her, again with the same knife and put her with Patricia.

He next poured gasoline next to or upon the body of the mother and in other areas of the home so as to prevent the children from leaving when the fire ignited.

He then went to the bedroom where his godson, Charles McCormack III was sleeping and using clothing attempted to start a fire there without accelerant.

He then returned to the mother and ignited the accelerant and left the home blazing with the victim and three young children still in the home.

THE COURT SPECIFICALLY FINDS that the murder was premeditated and with malice.

MITIGATING CIRCUMSTANCES

Subsection G

THE COURT FINDS that none of the mitigating circumstances enumerated in Subparagraphs 1 through 5 inclusive of Subsection G exist.

1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was not in any way significantly impaired.

2. The defendant was not under any unusual or substantial duress. In this regard, THE COURT FINDS that the defendant was jealous and that the defendant was angry, but neither in this case constitutes duress.

3. There was no other person involved in the commission of this offense other than the defendant.

4. The defendant could reasonably have foreseen that his conduct in the course of the commission of the offense would create a grave risk of causing death to other persons.

5. The defendant was approximately 36 years of age at the time.

The Court has further considered all other factors proffered by the defendant or the State which are relevant in determining whether to impose a sentence less than death including all aspects of the defendant's character, propensities and record, and all of the circumstances of the offense. In this regard, the Court has considered all of the information in the presentence report and all of the evidence heard in this trial and in the trial of Pima County Superior Court Case No. CR-00767, State of Arizona vs. Ignacio Alberto Ortiz, which was consolidated with the trial of this case, and the testimony in that case of the defendant, Mary Francis Ortiz, in her separate trial. The

charge in that case was Conspiracy to Commit First Degree Murder, and all counsel have been furnished with a transcript of Mary Francis Ortiz' testimony in that case. The Court has also considered all evidence presented at the Aggravation/Mitigation Hearing including the continuance thereof, and all arguments made. This includes the testimony of Dr. David B. Gurland, Psychiatrist.

THE COURT FINDS that after considering all of these factors, there are no mitigating circumstances sufficiently substantial to call for leniency. The Court has particularly considered as possible mitigating circumstances the factors urged by the defendant and makes the following findings with regard to each one:

1. The defendant argues that the length of the jury deliberation is a mitigating circumstance. The Court does not consider this in any way to constitute a mitigating circumstance.

2. The defendant argues that his ability to understand right from wrong is impaired by his lack of emotion. This has already been addressed in this verdict. Insofar as the lack of emotion is different than his ability to understand, the Court does not consider this to be a mitigating circumstance.

3. The defendant argues that he was under duress. This has already been addressed.

4. The defendant argues that he had no prior criminal record. THE COURT FINDS this circumstance to be true and ordinarily it would be mitigating, and the Court will consider it further in this verdict.

5. The defendant argues that his intelligence is a mitigating circumstance. THE COURT FINDS the defendant is of above-average intelligence and ordinarily this might also be a mitigating circumstance.

6. The defendant argues that he is a responsible member of the community. THE COURT FINDS that the defendant has maintained regular employment during his adult life. FURTHER

that he provided his family with a furnished house and the necessities of life, and he held a responsible position of leadership in the Teamster's Union. These factors would ordinarily be mitigating.

7. The defendant argues that he was a good father to his children. The defendant called his oldest son as a witness in this case. The Court was favorably impressed with his appearance and demeanor, and there is nothing to suggest that outwardly the defendant was anything but a good father to his children considering the father/child relationship only, and THE COURT SO FINDS.

8. The defendant argues that his activities in jail are a mitigating circumstance. This has to do with the self-professed religious training which the defendant has undertaken. THE COURT FINDS that this is true, and his religious faith is a mitigating circumstance. However, his activity in jail for the first three months - January, February and March of 1979, were devoted primarily to conspiring to murder the witnesses against him on the murder charge.

9. The defendant argues that he has a low recidivist prognosis. THE COURT FINDS in view of the defendant's lack of any prior criminal record and the fact that this was to some extent a crime of passion, the defendant may not engage in any further criminal behavior. This mitigating circumstance is offset to the extent that he conspired to kill the witnesses against him after the commission of the murder.

10. The defendant argues that there is a failure of proof of intent to kill by reason of the fact that felony murder instructions were submitted to the jury. The Court has already addressed this factor and now FINDS again that beyond any doubt this was a premeditated murder and there was a deliberate, calculated intent to kill.

The factors indicated above which might ordinarily constitute mitigating circumstances are not such by reason of the facts that the Court learned principally from the trial and the testimony of the defendant's wife in her trial. That evidence disclosed, and THE COURT FINDS that the defendant was an adulterer,

a violent wife beater and a liar. The only reason that the defendant did not have a prior criminal record is because he had not been charged and convicted.

THE COURT FINDS that it would be incongruous, to say the least, to find mitigating circumstances because of the outward appearance of the defendant's personal and family life with knowledge that the defendant was actually a mean, violent, unfaithful, and false person.

These findings of the existence of aggravating circumstances and the nonexistence of mitigating circumstances are both made beyond a reasonable doubt.

DATED this 15th day of October, 1979.

Judge of the Superior Court

PIMA COUNTY PUBLIC DEFENDER
45 WEST PENNINGTON STREET, THIRD FLOOR
TUCSON, ARIZONA 85701
TELEPHONE: [602] 791-3368

APPENDIX IV

TABLE OF AUTHORITIES INVOLVED

LAW OFFICES
PIMA COUNTY PUBLIC DEFENDER
45 WEST PENNINGTON STREET, THIRD FLOOR
TUCSON, ARIZONA 85701
TELEPHONE: (602) 791-3300

AUTHORITIES INVOLVED

AMENDMENTS

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him . . . .

The Eighth Amendment to the United States Corstitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [No State] shall deprive any person of life, liberty or property, without due process of law . . . .

ARIZ. REV. STAT. ANN. §13-703

§13-703. Sentence of death or life imprisonment without possibility of parole until the defendant has served twenty-five calendar years

A. A person guilty of first degree murder as defined in §13-1105, shall suffer death or imprisonment in the custody of the department of corrections for life, without possibility of parole until the completion of the service of twenty-five calendar years, as determined and in accordance with the procedures provided in subsections B through G of this section.

B. When a defendant is found guilty of or pleads guilty to first degree murder as defined in §13-1105, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances included in subsections F and G of this section, for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone.

C. In the sentencing hearing the court shall disclose to the defendant or defendant's counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life. Any presentence information withheld from the defendant shall not be considered in determining the existence or nonexistence of the circumstances included in subsection F or G of this section. Any information relevant to any mitigating circumstances included in subsection G of this section may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at

LAW OFFICES
PIMA COUNTY PUBLIC DEFENDER
45 WEST PENNINGTON STREET, THIRD FLOOR
TUCSON, ARIZONA 85701
TELEPHONE: [602] 791-3300

Ariz. Rev. Stat. Ann. §13-703 (Cont.)

criminal trials; but the admissibility of information relevant to any of the aggravating circumstances set forth in subsection F of this section shall be governed by the rules governing the admission of evidence at criminal trials. Evidence admitted at the trial, relating to such aggravating or mitigating circumstances, shall be considered without reintroducing it at the sentencing proceeding. The prosecution and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances included in subsections F and G of this section. The burden of establishing the existence of any of the circumstances set forth in subsection F of this section is on the prosecution. The burden of establishing the existence of the circumstances included in subsection G of this section is on the defendant.

D. The court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the circumstances set forth in subsection F of this section and as to the existence of any of the circumstances included in subsection G of this section.

E. In determining whether to impose a sentence of death or life imprisonment without possibility of parole until the defendant has served twenty-five calendar years, the court shall take into account the aggravating and mitigating circumstances included in subsections F of this section and G of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

F. Aggravating circumstances to be considered shall be the following:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, or anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel, or depraved manner.

7. The defendant committed the offense while in the custody of the department of corrections, a law enforcement agency or county or city jail.

G. Mitigating circumstances shall be any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any

Ariz. Rev. Stat. Ann. §13-703 (Cont.)

aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to the following:

1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

3. The defendant was legally accountable for the conduct of another under the provisions of §13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.

5. The defendant's age.

LAW OFFICES
PIMA COUNTY PUBLIC DEFENDER
45 WEST PENNINGTON STREET, THIRD FLOOR
TUCSON, ARIZONA 85701
TELEPHONE (602) - 791-3300

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SUPREME COURT, U.S.

LAW OFFICES
PIMA COUNTY PUBLIC DEFENDER
45 WEST PENNINGTON STREET, THIRD FLOOR
TUCSON, ARIZONA 85701
TELEPHONE: (602) 792-8951
DONALD S. KLEIN, #31396
ATTORNEY FOR DEFENDANT

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

NO. _____

IGNACIO ALBERTO ORTIZ,

Petitioner,

vs.

THE STATE OF ARIZONA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Petitioner, IGNACIO ALBERTO ORTIZ, asks leave to file the attached Petition for a Writ of Certiorari without prepayment of costs and to proceed in forma pauperis.

The Petitioner's affidavit in support of this motion is attached hereto. Petitioner proceeded as an indigent repre-

sented by court-appointed private counsel during the state court trial proceedings and by the Pima County Public Defender's Office during the state court appellate proceedings.

DATED this 13th day of March, 1982.

Donald S. Klein

DONALD S. KLEIN
Attorney for Petitioner

LAW OFFICES
PIMA COUNTY PUBLIC DEFENDER
115 WEST PENNINGTON STREET, THIRD FLOOR
TUCSON, ARIZONA 85701
TELEPHONE [602] - 791-3300

LAW OFFICES
PIMA COUNTY PUBLIC DEFENDER
45 WEST PENNINGTON STREET, THIRD FLOOR
TUCSON, ARIZONA 85701
TELEPHONE: [602] 791-3280

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED

IN FORMA PAUPERIS

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

I, IGNACIO ALBERTO ORTIZ, being first duly sworn, depose and say that I am the petitioner in the instant Petition for Writ of Certiorari, that I am the appellant in Arizona Supreme Court Case No. 4818, in which the Arizona Supreme Court affirmed my judgment and conviction and denied a Motion for Rehearing; that in support of my motion to proceed on the petition for certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceedings or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the petition for certiorari are true.

1. Are you presently employed?

ANSWER: No. The date of my last employment was December 20 , 1978. The amount of my salary and wages per month which I received, at that time, was $1320/month.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payment, interest, dividends, or other source?

ANSWER: No.

3. Do you own any cash or checking or savings accounts?

ANSWER: $35 in funds in account at Arizona State Prison.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

ANSWER: No.

...

5. List the persons who are dependent upon you for support and state your relationship to those persons.

ANSWER: None.

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Ignacio A. Ortiz
IGNACIO ALBERTO ORTIZ

SUBSCRIBED AND SWORN to before me this 12th day of March, 1982.

Donald S. Klein
Notary Public

My Commission Expires:
9/23/83

LAW OFFICES
PIMA COUNTY PUBLIC DEFENDER
45 WEST PENNINGTON STREET, THIRD FLOOR
TUCSON, ARIZONA 85701
TELEPHONE (602) 791-3580

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SUPREME COURT, U.S.

NO. 81-6385

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

IGNACIO ALBERTO ORTIZ

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent,

ON WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

ROBERT K. CORBIN
Attorney General of
the State of Arizona

WILLIAM J. SCHAFER III
Chief Counsel
Criminal Division

JACK ROBERTS
Assistant Attorney General
Department of Law
1275 W. Washington, 2nd Floor
Phoenix, Arizona 85007
Telephone: 255-4686

Attorneys for RESPONDENT

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NO. 81-6385

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

IGNACIO ALBERTO ORTIZ

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent,

RESPONSE TO PETITION FOR

WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. Since the Arizona Supreme Court has consistently given the same definitions for "cruel," "heinous," and "depraved," and has not hesitated to disagree with the trial courts when the latter have erroneously applied those definitions, has petitioner shown that the language of that particular aggravating circumstance has been applied to him in an overbroad or vague manner?

2. Did imposition of the death penalty in petitioner's case, after a full and independent review of aggravation and mitigation by the Arizona Supreme Court, violate due process?

3. When the statute requires imposition of the death penalty if the trial court finds even one aggravating circumstance, and there is nothing to balance because neither the trial court nor the Arizona Supreme Court found proffered mitigation sufficient to merit leniency, does it violate due process for the Arizona Supreme Court not to remand the case for resentencing?

STATEMENT OF THE CASE

Although Charles McCormack, Jr., and his wife experience marital difficulties in 1977-78, they reconciled in the fall of 1978. When they were having problems, Manuelita McCormack consulted an attorney about divorce proceedings. (R.T., Vol. 4, at 167-68.) Petitioner accompanied her on some of these occasions. (R.T., Vol. 3, at 167-61.) Two months before her murder, however, Manuelita McCormack reconciled with her husband and was happy. (R.T., Vol. 5, at 67.) Around Labor Day, 1978, she told petitioner not to call her anymore. (Id. at 126.) Only a week before her death, the victim asked her sister, Rosemary Valdez, to call and say that Rosemary's baby was sick. Manuelita anticipated a visit from petitioner and wished to avoid him by having to take her sister and niece to the doctor. (Id. at 70.) During the period when the victim was separated from her husband, petitioner offered to have her husband murdered. (Id. at 165.)

The night of December 21, 1978, petitioner murdered Manuelita McCormack, stabbed her two young daughters, set fire to the house to conceal his crimes, and left three children, including his own infant godson, in the burning house. Indeed, petitioner told Bernice McCormack to stay in the home until the firemen arrived.

Petitioner was indicted for murder, attempted murder, aggravated assault, arson, and burglary on December 29, 1978. While incarcerated in the Pima County Jail, petitioner told Jose Alvarez details of the murder. He also offered Alvarez $10,000 to murder six people, including the three children who had seen him murder their mother. Alvarez had a friend contact the Pima County prosecutor. Petitioner and his wife, Mary Frances Ortiz,

were subsequently charged with conspiracy to commit murder. Petitioner obtained a severance on the conspiracy charge and had that consolidated with the other pending offenses. The following is a summary of the most significant portions of the testimony at the trial in June, 1979.

Nine-year-old Patricia identified petitioner as "Nacho," Baby Charlie's godfather. (R.T., Vol. 2, at 107.) She had seen him come to visit her mother when her father was at work. (Id. at 110.) On December 21, 1978, the night of the murder, Patricia, Bernice, and Baby Charlie went to bed in Patricia's bedroom around 9 o'clock. (Id. at 116.) Bernice awoke Patricia to tell her that Baby Charlie wanted a glass of water. Having given Baby Charlie a glass of water, Bernice returned to the bedroom and informed Patricia that their mother was bleeding and that she had seen Nacho. (Id. at 127.) Afterwards, petitioner entered the children's bedroom and told them that he was going to call an ambulance for their mother. (Id. at 128.) The children played with clay, and the ambulance never arrived. (Id. at 130.)

Eventually, petitioner went into Patricia's bedroom and told her that her mother was asking for her. (Id. at 131.) When Patricia went into the living room, petitioner grabbed her from behind and stabbed her twice in the chest. (Id. at 134.) Patricia testified that she had seen the knife before, and that petitioner carried it in a sheath on his belt. (Id. at 135-37.) Patricia ran into her mother's bedroom and collapsed on the bed. She saw petitioner stab her younger sister, Bernice, when Bernice entered the bedroom. (Id. at 139.) Patricia testified that, after the stabbings, she heard a sloshing sound

reminiscent of liquid in a container and smelled gasoline. (Id. at 143-45.) After petitioner set fire to the house, Patricia managed to reach the sidewalk in front of the house, where she collapsed, bleeding and vomiting. (R.T., Vol. 3, at 66.) Dr. William Berkely testified that Patricia had no discernible blood pressure when she was brought to the hospital. One of the wounds inflicted by petitioner severed a major chest artery, and Patricia would have bled to death within 30 minutes if help had not been immediately available. (R.T., Vol. 5, at 15-27.) When paramedic Sherman Crawford reached Patricia McCormack, her skin was cold and she had no diastolic blood pressure. Patricia told Crawford that "Nacho" had stabbed her. (R.T., Vol. 4, at 103-04.) Bernice told Peter Jorgensen, another paramedic, that Nacho stabbed her with a hunting knife. More important, however, was Bernice's statement that petitioner placed her on the bed and told her to stay there until the fire department arrived. (Id. at 140-41.) The house was totally enveloped in flames when the first fire trucks arrived about 12:56 a.m. (Id. at 9-10, 60.) If Bernice had waited, as petitioner advised her to do, the children would have burned to death.

Firemen discovered a pile of clothing at the foot of the bed in Patricia's bedroom. On top of this clothing was a matchbook-cigarette time delay ignition device. (R.T., Vol. 6, at 16-17.) An F.B.I. fingerprint expert testified that two fingerprints lifted from the matchbook were those of petitioner's left index finger. (R.T., Vol. 7, at 35.)

While in Pima County Jail awaiting trial on charges of first degree murder, attempted murder, aggravated assault, arson, and burglary, petitioner struck up an acquaintance with Jose Alvarez and eventually became Alvarez's

cellmate. Alvarez was awaiting trial on multiple counts of armed robbery. According to Alvarez, petitioner asked to move in as his cellmate at the end of January 1979. Petitioner told Alvarez that he had killed his "comadre" at her house with a knife. (R.T., Vol. 7, at 142-45.) They talked about petitioner's case virtually every night until Alvarez entered Kino Hospital for knee surgery. Alvarez's testimony presented details of the killing that only the murderer could have made known to him. Petitioner told Alvarez that he parked his truck behind the McCormack residence, went in, and stabbed Manuelita McCormack in the chest with a hunting knife he was carrying. (Id. at 146-47.) He further related that he stabbed the two girls and told them to lie down (as Bernice McCormack had told a neighbor). (Id. at 148.) Moreover, he told Alvarez that he set the house on fire with gasoline from a container he had in his truck, and gave Alvarez details of the matchbook time-delay device that firemen found at the scene. (Id. at 149.) In addition, petitioner told Alvarez that police had found the knife and gasoline container at his home. (Id. at 156-57.) He indicated that he had cleaned the knife, but a little blood remained on it. (Id.) Before Alvarez went to Kino Hospital in late February, 1979, petitioner offered him $10,000 to kill six people. The proposed targets were the three McCormack children, Rosemary Valdez (the victim's sister), the vicitim's husband, and Diane Wilson, an acquaintance of the victim's husband. (Id. at 164-66.) Petitioner wanted the victim's husband and Diane Wilson killed first because he feared reprisal from the husband if the children were killed first. He also suggested that, if Patricia McCormack was still hospitalized when Alvarez was released, that Alvarez could

sneak into her room and inject heroin into her I.V. (Id. at 164-67, 180.) Petitioner repeatedly drew maps to show Alvarez where the children were living and going to school, was well as directions to the home of petitioner's mother-in-law. (Id. at 169-70.) The plan was as follows: Alvarez was to have someone obtain guns and place them in a bus depot locker. Petitioner's wife was to visit Alvarez in Kino Hospital to pick up the key to the locker. Mary Ortiz would then collect the guns from the locker and transport them to her mother's home. When Alvarez was released from the hospital, he was supposed to drive to the home of petitioner's mother-in-law at night, flash his lights one time, and wait for the mother-in-law to deposit the guns in the mailbox. (Id. at 170, 172-73.) Petitioner also told Alvarez that his wife had followed the children and the victim's husband, Charles McCormack, Jr. (Id. at 174-77.) Just before Alvarez went into the hospital, petitioner told him to arrange for the guns and petitioner would have someone else kill the six people. (Id. at 186.)

The jury convicted petitioner of all charges. After an aggravation-mitigation hearing, the trial court, having found three statutory aggravating circumstances and no mitigation substantial enough to call for leniency, imposed the death penalty. Petitioner appealed, raising seven major issues, including the ones presented to this Court. The Arizona Supreme Court affirmed the convictions and upheld the death penalty. State v. Ortiz, No. 4818 (Ariz.Sup.Ct., Nov. 23, 1981). The supreme court denied rehearing January 12, 1982.

ARGUMENT

I

THE PARTICULAR AGGRAVATING CIRCUMSTANCE ATTACKED BY PETITIONER HAS NOT BEEN INTERPRETED IN THREE DIFFERENT WAYS, AND IS NOT OVERBROAD OR VAGUE; ARIZONA'S DEATH PENALTY DOES NOT VIOLATE DUE PROCESS.

Employing a scattergun approach and making extremely careless representations about the law in Arizona, petitioner alleges that the interpretation of one particular circumstance is unconstitutionally overbroad, that failure to specify with exactness what constitutes mitigation and alleged failure to provide effective appellate review of death penalty cases, amounts to violation of due process. None of these contentions has merit.

A. The Arizona Supreme Court has consistently defined "cruel," "heinous," and "depraved" in the same manner.

Petitioner misleads this Court when he says that the Arizona Supreme Court has given three different interpretations to the aggravating circumstance of especially cruel, heinous, or depraved embodied in Ariz.Rev.Stat.Ann. § 13-703(F)(6). The Arizona Supreme Court has, over the years, clearly and repeatedly stated the same definitions for these terms. The Arizona Supreme Court has not given three different interpretations to one term, but a separate definition to each adjective within a circumstance that the legislature has written in the disjunctive. It is apparent that this is petitioner's real disagreement when he argues, in essence, that Arizona has to write a statute the same way other states do, and, by implication, interpret it the same way. Petitioner cites no authority for the proposition that a state has to use the same terminology as another state, or that a state may

not constitutionally write an aggravating circumstance in the disjunctive.

Appellant's citation to Godfrey v. Georgia, 446 U.S. 420 (1980), is inapposite. In the first place, the Georgia Supreme Court dealt with a statute significantly different from the Arizona statute and, until Godfrey, had given the statutory language a restricted meaning. Georgia Code Ann. § 27-2534.1(b)(7) states, in pertinent part, that the penalty of death may be inflicted if the offense was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." This Court had previously ruled that this language was not unconstitutional on its face. Gregg v. Georgia, 428 U.S. 153 (1976). This Court also expressed its belief that the Georgia Supreme Court would not adopt an unconstitutionally broad interpretation of the (b)(7) language. 428 U.S. at 201. In death penalty cases, the Georgia Supreme Court evolved a restrictive definition of this particular aggravating circumstance and made it clear that the (b)(7) language would not be applied in an overly broad fashion:

> Under our duty specified in Code Ann. § 27-2537(c)(2) we have no intention of permitting this statutory aggravating circumstance to become a "catch all" for cases simply because no other statutory aggravating circumstance is raised by the evidence.
>
> . . . .
>
> We believe that each of these cases establishes beyond any reasonable doubt a depravity of mind and either involved torture or an aggravated battery to the victim as illustrating the crimes were outrageously or wantonly vile, horrible or inhumane. Each of the cases is at the core and not the periphery, and we intend to restrict our approval of the death penalty under this statutory

aggravating circumstance to those cases that lie at the core.

Harris v. State, 237 Ga. 718, 732-33, 230 S.E.2d [illegible], 10-11 (1976) (emphasis added). In a later case, the Georgia Supreme Court held that torture and aggravated battery both require infliction of serious physical injury upon the victim before death. Blake v. State, 239 Ga. 292, 299, 236 S.E.2d 637, 643 (1977). In addition, the opinion in Blake equated "depravity of mind" with the infliction of torture or aggravated battery upon the victim before death. (Id.) In short, the outrageousnes or vileness of the act depended upon the depravity of mind, which -- in turn -- had to manifest itself in the form of serious physical injury upon a live victim either by torture or aggravated battery. Consequently, the Georgia Supreme Court had not affirmed the death penalty under a (b)(7) finding unless there was evidence of physical abuse to the victim before death.

In Godfrey, however, the jury simply found that the murders were "outrageously or wantonly vile, horrible and inhuman." Godfrey killed his wife and mother-in-law with shotgun blasts to the head. The state conceded that they died instantly and that no torture was involved. In his sentencing report, the trial judge stated that the murders did not involve torture. This Court reversed the death sentence: "The circumstances of this case, therefore, do not satisfy the criteria laid out by the Georgia Supreme court itself in the Harris and Blake cases." 446 U.S. at 432. That holding makes clear that this Court reversed because of Georgia's failure to consistently apply its own definition, not because that definition was unconstitutional. Indeed, by referring to the definition evolved in the Harris and Blake cases, this Court tacitly

recognized the legitimate power of the Georgia Supreme Court to develop its own definition. There is absolutely nothing in Godfrey supporting the proposition that states cannot constitutionally define terms such as "heinous" or "depraved." Nor is there anything in that opinion holding that every state must define such language in precisely the same manner.

The Arizona Supreme Court has consistently defined "cruel," "heinous," and "depraved" as follows:

> The words "heinous, cruel or depraved" have meanings that are clear to a person of average intelligence and understanding. Webster's Third New International Dictionary defines them as follows:
>
> heinous: hatefully or shockingly evil: grossly bad.
>
> cruel: disposed to inflict pain esp. in a wanton, insensate or vindictive manner: sadistic.
>
> depraved: marked by debasement, corruption, perversion or deterioration.

State v. Knapp, 114 Ariz. 531, 543, 562 P.2d 704, 716 (1977), cert. denied, 435 U.S. 908 (1978). See also State v. Lujan, 124 Ariz. 365, 372, 604 P.2d 629, 636 (1979); State v. Ceja, 115 Ariz. 413, 416, 565 P.2d 1274, 1277 (1977).

This Court has clearly held that state courts are the ultimate expositors of state law. Mullaney v. Wilbur, 421 U.S. 684 (1975); Murdock v. City of Memphis, 20 Wall. 590 (1875). Unless one can show infringement of federal constitutional rights, federal courts are bound by the interpretation the highest state court places upon state statutes. Williams v. Baker, 399 F.2d 681 (10th Cir. 1968); Miller v. Crouse, 346 F.2d 301 (10th Cir. 1965); Olson v. Tahash, 344 F.2d 139 (8th Cir.), cert. denied, 382

U.S. 858 (1965); United States ex rel. Scott v. Babb, 199 F.2d 804 (7th Cir. 1952), cert. denied, 344 U.S. 935 (1953). The Arizona Supreme Court has also repeatedly pointed out that "cruel" pertains to the deliberate infliction of physical pain or mental anguish upon the victims, while "heinous" and "depraved" refers to the killer's state of mind at and near the time of his murders as reflected in his words and actions. State v. Ceja, 126 Ariz. 35, 39, 612 P.2d 491, 495 (1980); State v. Lujan, supra. Since the statute is written in the disjunctive, the aggravating circumstance will be sustained if there is evidence beyond a reasonable doubt to support a finding of any one of those elements. State v. Clark, 126 Ariz. 428, 436, 616 P.2d 888, 896, cert. denied, 449 U.S. 1067 (1980); State v. Ceja, supra. In determining whether the murderer's actions reflect an especially "heinous" or "depraved" state of mind, the Arizona Supreme Court considers the totality of the circumstances -- as in petitioner's case -- not just the actual act of killing. State v. Ceja, supra. Thus, it is clear that the Arizona Supreme Court, having defined the three terms, has not changed the definitions, but considers each case to determine whether any one, or all three, may be present. Appellant's real objection is that the Arizona Supreme Court sustains the finding if any one of the elements exists; petitioner implies that it is somehow constitutionally impermissible to do so, without citing authority to that effect. Obviously, the legislature could have achieved exactly the same result by placing each of the terms in a separate aggravating circumstance instead of writing one circumstance in the disjunctive. The result would have been precisely the same -- aggravation would exist if the evidence supported the finding of any one element.

Petitioner's argument that Ariz.Rev.Stat.Ann. § 13-703(F)(6) is unconstitutional because it fails to require proof of torture or an aggravated battery is nonsensical. Again, there is nothing in Godfrey, supra, or the Constitution that requires a state to phrase or interpret an aggravating circumstance precisely as another state has done. Some states have more, and different, aggravating circumstances than Arizona. Does that render their statutes unconstitutional? Moreover, petitioner is wrong when he asserts that every state has interpreted similar terms to require torture and aggravated battery. Florida has plainly interpreted cruelty, as has Arizona, to include mental anguish as well as physical pain. Francois v. State, 407 S.2d 885, 890 (Fla. 1981) (finding of cruelty appropriate where successive victims suffered mental anguish hearing gunshots that killed first victim and realizing that their fate was sealed); Washington v. State, 362 S.2d 658, 665 (Fla. 1978), cert. denied, 441 U.S. 937 (1979) (especially cruel and artrocious where victim was tied spread-eagle on bed, helpless, and stabbed a day later; mental anguish awaiting death); Knight v. State, 338 S.2d 201, 202 (Fla. 1976) (husband and wife suffered prolonged mental anguish by being kidnapped and becoming increasingly aware of their imminent murders). Proof of the fact that the Arizona Supreme Court carefully distinguishes "cruel" from "heinous" and "depraved" may be seen in a series of cases in which the court, finding neither deliberate infliction of physical suffering nor mental anguish, refused to find the element of cruelty. State v. Bishop, 127 Ariz. 531, 534, 622 P.2d 478, 481 (1980) (although defendant repeatedly struck victim in head with claw hammer, medical testimony established that victim

did not feel successive blows, therefore precluding the finding of cruelty; the killing was, however, committed in an especially heinous and depraved manner when viewed in the totality of the defendant's acts and words, including his dragging the victim to a mine shaft, throwing the still twitching body into it, covering the body with rocks, and saying, "Good-bye Norman, I hope we never see you again."); State v. Clark, supra (not cruel because of lack of proof of physical suffering or mental anguish preceding death; especially depraved, however, because the defendant killed four people, two of whom had given him a job and a place to stay, and a teenager who had tried to befriend him); State v. Ceja, supra (not cruel because multiple gunshot wounds caused instantaneous death; but especially heinous and depraved because defendant, having killed both victims, continued pumping shots into their bodies, and kicked one victim repeatedly about the face.) Petitioner also fails to point out that the Arizona Supreme Court did not agree with the trial court that the murder petitioner committed was especially cruel, but did agree that it was especially heinous and depraved. Slip opinion at 33. That holding is perfectly consistent with the cases discussed above because the state did not prove, in petitioner's case, that the victim endured physical suffering or mental anguish preceding her death by multiple stab wounds.

Petitioner makes a distinction without a difference when he states that the trial court in State v. Steelman, 126 Ariz. 19, 612 P.2d 475 (1980), found the murders to be especially heinous while the trial court before whom Steelman's codefendant, Douglas Gretzler, was tried, did not find that Gretzler committed the murders in an especially heinous fashion. Petitioner does not inform

this Court that the distinction is academic since both Steelman and Gretzler received the death penalty. That result was hardly surprising since both had previously been convicted of nine murders in California.

In summarizing, respondent points out that petitioner's entire argument is based on a distorted interpretation of Arizona cases, that Arizona has separately defined each of three terms within an aggravating circumstance that the legislature chose to write in the disjunctive, and that nothing in the Constitution or any decision of this Court forbids framing an aggravating circumstance in the disjunctive or requires that every state interpret terms precisely as every other state. Since Arizona has given distinct definitions and consistently applied them, the Constitution is not offended, and the inconsistent application, not definition, that was present in Godfrey v. Georgia, supra, has not been shown.

B. Lack of definition about what constitutes sufficient mitigation to merit leniency.

Although petitioner knows that this argument is without merit and has already been decided by this Court, he contends that the death penalty is invalid because the Arizona Supreme Court has never defined what constitutes mitigation sufficiently substantial to warrant leniency. The proposition is so inherently absurd that it hardly merits response. This Court mandated open-ended presentation of possible mitigating factors precisely so that a defendant could present anything in an attempt to establish mitigation. Lockett v. Ohio, 438 U.S. 586 (1978). Moreover, this Court has already ruled that the death penalty may be constitutionally imposed provided that the sentencer's decision is channeled and guided by specific factors that weigh for or against the penalty:

> While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of Furman are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.

Proffitt v. Florida, 428 U.S. 242, 258 (1976). No one could ever devise a list of aggravating or mitigating factors that would meet with universal approval. The moment someone compiled a list of mitigation and attempted to assign specific weights to each circumstance, defendants would raise another hue and cry disagreeing with the factors listed and/or their respective weights. This Court has never required intransient, specifically weighted standards to be applied in mitigation. Indeed, such a task would be impossible precisely because of the virtually infinite combinations of circumstances accompanying crimes and the varying backgrounds, and possible prior criminal records, of individual defendants. It is apparent that there can be no absolutely fixed list of mitigating factors. In addition, the process is more than a mechanical tallying of mitigation against aggravation. The Arizona Supreme Court and other courts has made it clear that the quality of the particular circumstance, as well as the total number of each kind, ultimately determines whether the death penalty shall be imposed. State v. Brookover, 124 Ariz. 38, 601 P.2d 132 (1979); State v. Knapp, 125 Ariz. 503, 504, 611 P.2d 90, 91 (1980). Other states have reached this same logical conclusion. Hargrave v. State, 366 S.2d 1 (Fla. 1978), cert. denied, 444 U.S. 919 (1979). In noting that Knapp received the death

penalty but Brookover did not, even though the Arizona Supreme Court found one aggravating and one mitigating circumstance in each case, petitioner conveniently omits mentioning the nature and quality of the mitigation. Knapp burned his two small daughters to death by setting fire to their bedroom. The only mitigating factor was his lack of a prior criminal record. Brookover had a prior conviction for possession of marijuana; medical testimony, however, established that he suffered from a neurological lesion. Although the trial court did not find this substantial enough to warrant leniency, the Arizona Supreme Court, in its independent review and weighing of aggravation and mitigation, found that this neurological problem was a major cause of Brookover's behavior and thus constituted sufficient mitigation to reduce the sentence to life. 124 Ariz. at 42, 601 P.2d at 1326.

C. Appeals in death penalty cases are automatic in Arizona. The Arizona Supreme Court independently reviews the trial court's findings of aggravation and mitigation, and independently determines whether death has been properly imposed.

Petitioner contends that the Arizona Supreme Court does not perform a constitutionally acceptable proportionality review involving all death penalty cases. Apparently, petitioner has been reading cases different from those respondent reads because it is clear from all death penalty cases, including petitioner's, that the Arizona Supreme Court takes very seriously the obligation to ensure that the death penalty is not arbitrarily imposed, and does compare each case to other cases. State v. Ortiz, supra (slip op. at 24-25). Appeals in death penalty cases are automatic in Arizona and go directly to the supreme court. Rule 31.2(b), Arizona Rules of Criminal Procedure; Ariz.Rev.Stat.Ann. § 13-4031. By statute, the supreme

court must search the entire record for fundamental error. Ariz.Rev.Stat.Ann. § 13-4035. In describing the keen sense of duty it feels when reviewing these cases, the Arizona Supreme Court said:

> The question before us is not whether the trial court properly imposed the death penalty, but whether, based upon the record before us, we believe that the death penalty should be imposed. A finding merely that the imposition of the death penalty by the trial court was "factually supported" or "justified by the evidence" is not the separate and independent judgment by this court that the death penalty warrants. This is in keeping with the mandate of the United States Supreme Court that we must review carefully and with consistency death penalty cases and not engage in a "cursory" or "rubber stamp" type of review. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).
>
> The death penalty statute must not be applied freakishly or unevenly. We review each and every death penalty imposed in the State of Arizona, and not only are we in a position to insure that, based upon all the records that come before us, the death penalty is evenly enforced on appeal, but also that it is not inflicted in an arbitrary and capricious manner. As was stated by the United States Supreme Court:
>
> > "[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859, 883 (1976).
>
> And:
>
> > "This means that if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. * * *." Godfrey v. Georgia, 446 U.S. 420, 428, 100

S.Ct. 1759, 1764, 64 L.Ed.2d 398, 406 (1980).

State v. Watson, 129 Ariz. 60, 63, 628 P.2d 943, 946 (1981). The Arizona Supreme Court has not hesitated to disagree with the trial court's finding of aggravation or, in its independent assessment of aggravation and mitigation, to determine that migitation may be substantial enough to call for leniency. State v. Watson, supra (reduced to life because of model prisoner mitigation and attempts to obtain education); State v. Lujan, supra (supreme court disagreed with trial court's finding of aggravation and reduced sentence to life); State v. Brookover, supra (neurological lesion found to be major causative factor in defendant's actions sufficient to reduce sentence to life). This argument has no merit.

II

IMPOSITION OF THE DEATH PENALTY IN PETITIONER'S CASE IS AMPLY SUSTAINED BY THE EVIDENCE AND DOES NOT VIOLATE DUE PROCESS OR CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.

A. The Arizona Supreme Court properly found that the prosecution gave petitioner sufficient notice about the particular circumstances and evidence upon which it would rely to prove aggravation.

Citing a case that involved absolutely no information about the nature of charges against a juvenile, petitioner fallaciously analogizes the notice he received to that received by the parents in In Re Gault, 387 U.S. 1 (1967). In that case, as this Court is well aware, the parents of a juvenile against whom delinquency proceedings had been instituted received notice of nothing but the date of the proceedings. That is not what happened in petitioner's case, and that is also the reason that he merely makes the assertion without demonstrating precisely what it was that supposedly surprised or prejudiced him. The Arizona

Supreme Court correctly held that the state provided petitioner ample notice of the circumstances it would seek to prove and the evidence upon which it would rely far enough in advance of the aggravation-mitigation hearing to allow defense counsel to prepare. State v. Ortiz, supra, at 26-27.) The state filed a 12-page memorandum September 10, 1979, disclosing its intention to rely on the circumstances of Ariz.Rev.Stat.Ann. § 13-703(F)(3) and (6). The state submitted an additional memorandum September 12, and a third memorandum October 2, which stated that the prosecutor would also seek aggravation under Ariz.Rev.Stat.Ann. § 13-703(F)(1). (Appendix.) Moreover, defense counsel filed a 6-page reply to those memoranda. That memorandum, which includes a point-by-point refutation of the factual basis upon which the state intended to rely to establish the existence of the circumstances in Ariz.Rev.Stat.Ann. § 13-703(F)(3) and (6), makes it perfectly plain that defense counsel knew exactly what the state would try to show; otherwise, he could not have responded in detail. (Appendix.) As the Arizona Supreme Court notes in the opinion, the statute provides that all evidence admitted at trial that may bear upon aggravation or mitigation "shall be considered" without having to reintroduce it at the sentencing hearing. Ariz.Rev.Stat.Ann. § 13-703(C). Thus, petitioner was clearly on notice that the state would seek to prove three aggravating circumstances based upon any evidence adduced at trial, and, in particular, that evidence discussed in the three memoranda submitted by the state. It is ludicrous to assert that one who sat through the entire trial and heard every detail (which he already knew) could not possibly imagine what evidence the prosecution

would use to prove aggravation. That, of course, was not the situation in Gault, supra. Moreover, petitioner never says what surprised him or what he could possibly have done to rebut anything presented. The record is clear that petitioner was fully advised of the aggravating circumstances the state would attempt to prove in advance of the sentencing hearing.

B. Petitioner was not denied any Sixth Amendment right to confront his wife because this Court has never held that all due process rights apply to sentencings, and petitioner could not have rebutted the evidence because he had admitted to two doctors, one of them a defense witness, that he had beaten his wife and had extramartial affairs.

Petitioner correctly recognizes, as did the Arizona Supreme Court, that this Court has never held that the full panoply of procedural due process rights available to a defendant prior to and during trial are equally mandated at a sentencing hearing. Williams v. New York, 337 U.S. 241 (1949). Neither does Gardner v. Florida, 430 U.S. 339 (1977), lend support to petitioner's claims on the specific facts of this case. In Gardner the jury had found some aggravation but mitigation sufficient to render an advisory opinion recommending life imprisonment. The trial court, however, after considering a presentence report that it did not fully disclose to either counsel, stated that it was imposing the death penalty because there was aggravation and no mitigation. The trial court made it clear that it was doing so, at least in part, in reliance on information in the presentence report. Thus, that case involved a failure to disclose information to the state or defense counsel. This Court found that procedure did violate due process. However, in stating in general terms that sentencing procedures had to comply with due process, Justice Stevens inserted a familiar caveat:

> The fact that due process applies does not, of course, implicate the entire panoply of criminal trial procedural rights.
>
> "Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands. . . . Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure." Morrissey v. Brewer, 408 U.S. 471, 481.

430 U.S. at 358 n.9. It is quite clear, therefore, that "due process" retains much of the amorphous and chameleon-like quality that has long characterized this pragmatic concept, and does not, on the facts of this case, mandate a finding that a defendant has a Sixth Amendment right to cross-examine a witness whose testimony the state offered, not in aggravation to enhance punishment, but a rebuttal to petitioner's proffer of mitigation. This is particulary true in light of the fact, nowhere mentioned by petitioner, that he admitted to Dr. Ginnetti that he had engaged in numerous extramarital affairs and beaten his wife, and admitted to Dr. Gurland that he had beaten his wife. (R.T. of Oct. 4, 1979, at 12-13; Dr. Ginnetti's evaluation of July 18, 1979, at 3.) How was petitioner going to surrebut what he had told his own expert witness? The Court will note that petitioner does not allege that he could have produced any surrebuttal, or that he did not relate that information to the doctors. The last case upon which petitioner relies, Specht v. Patterson, 386 U.S. 605 (1967), is easily distinguishable from the case sub judice. This Court first reiterated that it adhered to its

earlier holding in Williams v. New York, supra. Having reaffirmed its holding in Williams, this Court indicated that the case before it evolved within a radically different context. Specht was charged and convicted under a statute that provided for a maximum penalty of 10 years. He was sentenced, however, not under the statute under which he was convicted, but under Colorado's Sex Offenders Act, which allowed an indeterminate sentence of 1 day to life if the offender was found to constitute a menace to society, or to be an habitual offender and mentally ill. The requisite psychiatric evaluation was performed, and a report forwarded to the trial court. Specht's counsel, however, did not receive a copy of the report, and did not have the chance to cross-examine the psychiatrist. The Court said:

> [T]he invocation of the Sex Offenders Act means the making of a new charge leading to criminal punishment.

386 U.S. at 610 (emphasis added, citation omitted). Thus, Specht was subjected to a totally different range of penalties -- not limited to the 10 years in the statute under which he was convicted -- and given no hearing at all. That obviously is not the case before this Court.

The Arizona Supreme Court correctly decided that the Sixth Amendment right to confrontation has never expressly been held to apply to sentencings, as opposed to trials. In addition, petitioner did not argue on appeal, and does not argue here, that he could have produced any mitigation from cross-examining his wife, nor does he argue that he could have rebutted what the state offered in rebuttal to his mitigation. It is patent that he could not have because, as respondent has pointed out, petitioner admitted to two doctors that he was an adulterer and had beaten his wife.

C. The trial court did not consider any non-statutory aggravating circumstances.

Because the trial court did not find mitigation, petitioner maintains that the trial court actually used the fact that he was a liar, adulterer, and wife-beater as non-statutory aggravating factors. The trial court simply stated the some factors it might ordinarily have considered mitigation were offset by rebuttal in the form previously mentioned. That special verdict also indicates that petitioner's proffered mitigation was considerably weakened by the fact, specifically mentioned twice in the special verdict, that he spent the first three months in jail conspiring to murder the child-witnesses against him. (Petitioner's Appendix III, at 5.) The jury determined that petitioner was a liar when it convicted him of all charges. Since petitioner admitted to Drs. Ginnetti and Gurland that he was an adulterer and wife-beater, there is little point in protesting the existence of that information at this late date. Moreover, even if the trial court found everything petitioner offered as mitigation, it would still have had to weigh whether that was substantial enough to call for leniency in view of the aggravation proven. Finally, in its independent review of the entire record, the Arizona Supreme Court agreed with the trial court that whatever mitigation petitioner had offered, "it was not sufficiently substantial to call for leniency." Slip opinion, at 35. In essence, petitioner argues that the state may not produce, and the trial court may not consider, rebuttal to mitigation. However, Ariz.Rev.Stat.Ann. § 13-703(C) specially allows either party to rebut evidence presented by the other. Petitioner is of the opinion that all evidence offered in rebuttal to

mitigation is actually aggravation in disguise. Such "aggravation," of course, could not be used under the specifically restricted list of aggravating factors in Ariz.Rev.Stat.Ann. § 13-703(F) and was not so used in this case.

D. Since the Arizona Supreme Court had never considered a case with a similar factual predicate, it did not depart from precedent in finding that petitioner created a grave risk of death to others during the commission of the offense.

Attempting to have this Court agree with him about a premise upon which he could not persuade the Arizona Supreme Court, petitioner argues that the Arizona Supreme Court "deviated from established precedent"when it considered that total chain of his actions in murdering Manuelita McCormack and setting fire to the house, with the three small children in it, in an attempt to cover his tracks. Respondent notes that petitioner does not allege that the circumstances of the two cases he cites are similar to those of his case. They are not. Petitioner unsuccessfully attempted to convince the Arizona Supreme Court to artifically compartmentalize his continuing chain of actions so that it would consider only the actual stab wounds as he inflicted them upon the victim. This the supreme court refused to do. Noting that the concealment of the murder was intimately bound up with the murder, the Arizona Supreme Court held that in setting fire to the house, after stabbing Patricia and Bernice and telling them to wait for the firemen, petitioner created a grave risk of death to others. Slip opinion, at 31. That conclusion could not have been more logical. It is true that in neither Clark, supra, nor Ceja, supra, did the Arizona Supreme Court find this particular circumstance. The reason is that the defendants in both those cases intended to, and did, kill everyone present at the scene. In addition, there was no

evidence that while Clark and Ceja were shooting, any other person who was not later deliberately murdered, was in a zone of danger, e.g., in the path of errant bullets. It is equally clear, that neither Clark nor Ceja stabbed two small girls, told them and their 3-year-old brother (petitioner's godson in this case) to stay in the house until the firemen arrived, and then set fire in several locations throughout the house using trailers to increase the conflagration. Contrary to petitioner's assertion, the Arizona Supreme Court had never previously interpreted the phrase "in the commission of the offense" in Ariz.Rev.Stat.Ann. § 13-703(F)(3) to be limited to only those acts that immediately produce the death of a victim. The decisions mentioned by petitioner merely held that, on the particular facts of those cases, the defendants did not endanger others by the actual act of firing a gun; those cases did not hold that "in the commission of the offense" was rigidly limited to the immediate death-producing act and could not encompass a deliberate arson calculated to conceal a murder that had immediatey preceded it. See also King v. State, 407 S.2d 904 (Fla. 1981) (Florida Supreme Court upheld trial court's finding that, in the commission of the offense, the defendant created a great risk of danger to many others by committing arson after he had raped and killed an elderly lady, thus endangering fireman and others who might attempt to extinguish the blaze and rescue the victim.)

Similarly, petitioner errs in his assertion that the Arizona Supreme Court deviated from previous holdings by relying on acts immediately surrounding the killing to find that petitioner committed the murder in an especially heinous and depraved manner. Both Ceja, supra, Lujan,

supra, make it clear that the Arizona Supreme Court considers the totality of the circumstances surrounding the actual murder and does consider behavior other than the actual death-producing act. 126 Ariz. at 39-40, 612 P.2d at 495-96; 124 Ariz. at 372, 604 P.2d at 636. Therefore, the particular circumstances of this case, when viewed in light of previous cases involving the finding of "heinous" and "depraved," fully justify the finding of that circumstance.

State v. Johnson, ___ Ariz. ___, 640 P.2d 861 (1982), is easily distinguishable from petitioner's case. The Arizona Supreme Court dealt there, not with a first-degree murder case and the death penalty, but with solicitation to commit murder. Thus, it was obvious that since no murder had been committed, the trial court erred in considering how the murder might have been committed. It is common sense that a court will not consider as aggravation conjectured charactertistics of an unconsummated act. 640 P.2d at 866. That decision lends no support to petitioner's argument since he did murder his former paramour, stabbed two small children, and left them and his own 3-year-old godson in a burning house, telling them to wait for the firemen.

III

THE ARIZONA SUPREME COURT DID NOT REMAND THE CASE BECAUSE THE TRIAL COURT CORRECTLY DETERMINED THE EXISTENCE OF TWO AGGRAVATING CIRCUMSTANCES AND NO MITIGATION SUBSTANTIAL ENOUGH TO WARRANT LENIENCY.

Under Arizona law, if the trial court finds one aggravating circumstance and no mitigation substantial enough to call for leniency, it must impose the death

penalty. Ariz.Rev.Stat.Ann. § 13-703(E). In the case at bar, the Arizona Supreme Court held that the trial court had properly found two aggravating circumstances, and that the mitigation offered by petitioner was not substantial enough to merit leniency. Since both the trial court and the Arizona Supreme Court, in its independent review of the record, determined that there was no mitigation warranting leniency, there was no point in remanding the case. It would have made no difference if the supreme court had agreed with the trial court about only one aggravating circumstance because it is the absence of mitigation that requires the imposition of the death penalty, not multiple aggravating circumstances. Respondent also points out that the Arizona Supreme Court did not "reverse," in the ordinary sense of the word, the trial court's holding with respect to the circumstance in Ariz.Rev.Stat.Ann. § 13-703(F)(6). Although it disagreed with the finding of especially "cruel," it agreed that petitioner committed the offense in an especially heinous and depraved manner. In view of the fact that that particular circumstance is written in the disjunctive, the supreme court upheld the finding of that circumstance, although not the specific element of cruelty. Other states whose statutes also require the imposition of death when there is one aggravating factor and insufficient mitigation have refused to remand the case for resentencing. Francois v. State, supra; Enmund v. State, 399 S.2d 1362 (Fla 1981); State v. Mattheson, 407 S.2d 1150 (La. 1981); State v. Williams, 383 S.2d 369 (La. 1980), cert. denied, 449 U.S. 1103 (1981); State v. Martin, 376 S.2d 300 (La. 1979); cert. denied, 449 U.S. 998 (1980); State v. Goodman, 257 S.E.2d 569 (N.C. 1979).

Respondent is aware that this Court has heard arguments in Zant v. Stephens, 631 F.2d 397 (5th Cir. 1980), cert. granted, No. 81-89. Until that case is decided, however, respondent submits that there is no precedent from this Court necessitating a remand under the circumstances of this case. Moreover, even if the Court should affirm the Fifth Circuit's decision, respondent points out that the trial court, not the jury, determines the aggravation and mitigation in Arizona, and that the particular circumstance about which the Arizona Supreme Court disagreed with the trial court (use of simultaneous conviction -- conspiracy to commit murder -- to aggravate) was a mistake of law, not of fact, and quite different in quality from the matters considered and determined by the Georgia jury in Zant v. Stephens, supra. When there is nothing to balance, due to a lack of mitigation, it is futile to remand the case so long as the trial court has properly found at least one aggravating circumstance.

CONCLUSION

The interpretation of the highest state court about a matter of state law is binding on this Court in the absence of infringement upon the Constitution. Arizona has clearly and repeatedly defined the terms used in Ariz.Rev.Stat.Ann. § 13-703(F)(6). The fact that petitioner does not agree with the legislature's choice to write that circumstance in the disjunctive does not render the statute unconstitutional. Nor does the fact that some (but not all) states have interpreted roughly similar language differently, render Arizona's interpretation impermissible. Arizona has applied its definitions consistently -- regardless of petitioner's dislike for them. Petitioner's case, in which the Arizona Supreme

Court disagreed with the trial court's finding that the offense was committed in an especially cruel mannner, and the other cases respondent has cited, amply demonstrate that the Arizona Supreme Court has assiduously monitored these cases to assure evenhanded application and interpretation of aggravating circumstances. Likewise, there is no basis for the contention that the Arizona Supreme Court does not diligently perform a proportionality review of all death-penalty cases.

Equally lacking in merit are petitioner's assertions that he did not receive adequate notice of the particular circumstances upon which the state would rely to prove aggravation and, especially in view of the fact that he admitted to two doctors that he had beaten his wife and engaged in numerous extramarital affairs, the argument that he was denied a Sixth Amendment right to cross-examine his wife. As respondent has noted, the state offered that testimony, not to establish aggravation, but to rebut mitigation. Petitioner does not argue -- because he could not -- that he could have rebutted his own prior admissions to the doctors.

When there is no balancing to perform, because the defendant has produced no persuasive mitigation, there is no reason to remand a case after the highest appellate court agrees with the trial court that two aggravating circumstances do exist.

Petitioner has not raised a substantial federal question and has not demonstrated infringement of

constitutionally protected rights. Therefore, respondent respectfully requests that the Court deny certiorari.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General

WILLIAM J. SCHAFER, III
Chief Counsel
Criminal Division

JACK ROBERTS
Assistant Attorney General

Attorneys for RESPONDENT

A F F I D A V I T

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

JACK ROBERTS, being first duly sworn upon oath, deposes and says:

That he served the attorney for the petitioner in the foregoing case by forwarding one (1) copy of RESPONSE TO PETITION FOR WRIT OF CERTIORARI, in a sealed envelope, first class postage prepaid, and deposited same in the United States mail, addressed to:

DONALD S. KLEIN
Deputy Public Defender
45 West Pennington, 3rd Floor
Tucson, Arizona 85701
Attorney for PETITIONER

this 13th day of April, 1982.

Jack Roberts
JACK ROBERTS

SUBSCRIBED AND SWORN to before me this 13th day of April, 1982.

Elizabeth J. Bender
NOTARY PUBLIC

My Commission Expires:

July 17, 1982

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bb

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY
900 Pima County Courts Building
111 West Congress Street
Tucson, Arizona 85701
Telephone: 792-8411

FILED IN COURT
Sept 10 1979
JAMES N. CORBETT, Clerk
B Domingues
Deputy

CR-00284

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

THE STATE OF ARIZONA,)
Plaintiff,)
vs.)
IGNACIO A. ORTIZ,)
Defendant.)

NO. CR-00284

RESPONSE TO DEFENDANT'S MOTION FOR BILL OF PARTICULARS AND MEMORANDUM ON DEATH PENALTY

COMES NOW the State of Arizona, by and through the Pima County Attorney, STEPHEN D. NEELY, and his deputies, KENNETH J. PEASLEY and ELIZABETH C. PEASLEY, and respectfully submits the following response to the defendant's motion for bill of particulars and memorandum in support of the State's request that the penalty of death be imposed in this case.

Respectfully submitted this 10th day of Sept, 1979.

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY

Kenneth J. Peasley
Deputy County Attorney

Elizabeth C. Peasley
Elizabeth C. Peasley
Deputy County Attorney

PIMA COUNTY ATTORNEY
COUNTY GOVERNMENTAL CENTER
900 COURTS BLDG.
111 W. CONGRESS STREET
TUCSON, ARIZONA 85701
792-8411

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MEMORANDUM

In the present case the defendant, Ignacio Ortiz, has been convicted of eight separate felony counts. This response and memorandum is directed towards the defendant's conviction of first degree murder. The testimony at trial revealed that the defendant was having a sexual affair with the victim, Manuelita McCormack. On the night in question, the defendant went to the victim's house, taking with him a can of gas and a hunting knife.

The defendant entered the residence, had words with Manuelita McCormack, strangled her, stabbed her in and about the neck area, doused her body with gasoline, stabbed two little girls and then set the house on fire with Patricia McCormack, Bernice McCormack and little Charlie McCormack still inside the residence.

The State hereby indicates its intent to seek the penalty of death.

In its motion for bill of particulars the defendant requests that he be noticed concerning what aggravating circumstances the State intends to produce evidence on. Initially, the State would point out that a no bond hearing was held in this case at which time the State indicated what, among others, aggravating circumstances existed to justify holding the defendant without bond.

Additionally, the State does not feel that it is obliged to enumerate further those aggravating circumstances upon which it will present evidence. Nevertheless, the State will indicate at this time that it intends to present evidence on those aggravating circumstances which are enumerated and discussed in A.R.S. §13-703 (F)(3)(6). The State does not intend to be limited to those factors, however, a review of the applicable statute indicates that those factors may in fact be the only ones which exist.

Pursuant to A.R.S. §13-703 (C), the State respectfully requests this Court to consider the evidence and testimony admitted at trial insofar as such evidence and testimony relates

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...0 COUNTY BLDG.
...0 W. CONGRESS STREET
TUCSON, ARIZONA 85701
...2-0411

to the existence of aggravating circumstances set forth in A.R.S. §13-703(F)(3)(6).

The statute clearly points out that once this evidence had been admitted at trial it need not be introduced at the time of the sentencing proceedings, including hearings on aggravation and mitigation.

The State also respectfully urges this Court to make a factual finding that the murder of Manuelita McCormack was committed by the defendant, Ignacio A. Ortiz, in a cold, calculate and premeditated design. The State requests this Court to further find that Manuelita McComack's death was intended by the defendant Ignacio Ortiz prior to the actual killing. That is, that the defendant specifically intended to kill Manuelita McCormack at the time that he arrived at the residence on the night in question.

Arizona's death penalty statute has been recently addressed by the Arizona Supreme Court in the case of State v. Watson, 120 AZ. 441, 586 P.2d 1253 (1978). In this case, the Arizona Supreme Court, following the mandates of Lockett v. Ohio, 57 L.Ed.2d 973 (1978), declared unconstitutional that portion of the Arizona's death penalty statute which limited the number and kind of mitigating circumstances that could be presented by the defendant in order to avoid the death penalty.

The present Arizona death penalty statute, as interpreted by Watson , provides that the defendant may introduce any number or kind of mitigating circumstances in order to avoid the imposition of the death penalty. The statute is otherwise constitutional.

With respect to the aggravating circumstance discusse under A.R.S. §13-703(F)(3), the State would initially call the Court's attention to State v. Watson, supra. In Watson, the defendant and others were burglarizing a residence. While in the residence, the defendant went upstairs, and while upstairs, the owner of the home, the victim, obtained his gun and began shootin at the co-defendant. The defendant came back downstairs and shot

PIMA COUNTY ATTORNEY
COUNTY GOVERNMENTAL CENTER
SUITE 800 COURTS BLDG.
111 W. CONGRESS STREET
TUCSON, ARIZONA 85701
792-8411

the victim in the back four times, the last time while the victim was face down on the floor. The Court noted that although the killing was shocking, it was not in a particular heinous, cruel or depraved manner as contemplated by the statute. In Watson the Court was also asked to determine whether the offense was committed by the defendant creating "a grave risk of death to another . . .". The Court noted at the time of the shooting, both the victim's wife and daughter had left the residence. This aggravating circumstance was therefore not shown as no one else was present. (Emphasis added)

In State v. Doss, 116 AZ. 156, 568 P.2d 1054 (1977), the defendant, after a brief argument with the victim, drove to his home, got his revolver, returned to the college where the victim was and sought the victim out. He found the victim in the college gymnasium which was crowded with students registering for classes. The defendant came up to the victim from behind and emptied his revolver at him, killing the victim and wounding a student standing thereby. The Court found the existence of the aggravating circumstance that states that during the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense, in that the defendant shot the victim in a place crowded with college students and one of the students was indeed wounded by one of the shots.

In State v. Ceja, 115 Ariz. 413, 565 P.2d 1274 (1977), the defendant went to the decedent's home with the intent of "ripping-off" his drugs. When he arrived, the deceased's wife was home alone and she resisted him in his attempt to take the drugs. The defendant shot her twice while in the living room, dragged her into the bedroom and there shot her again several times, emptying his gun to "finish her off." Either while shooti the wife in the bedroom or soon thereafter, the deceased drove up to the house. When the deceased came in, the defendant ordered him at gunpoint to go innto the bedroom where the deceased was th

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shot. He had been shot twice in the front and twice in the back. In addition, numerous abrasions were found around his face, which were caused by kicks by the defendant subsequent to the shooting. The court held that the defendant did not create a grave risk of death to the deceased in the commission of the offense against the deceased's wife because the evidence indicated that the deceased did not drive up to the house until the defendant had dragged the deceased's wife into the bedroom and shot her again. There was no evidence presented which tended to demonstrate that the defendant, in killing the deceased's wife created a grave risk of death to the deceased.

The court then went on to discuss whether the offense had been committed in an especially heinous, cruel or depraved manner. Citing State v. Blazak, 114 Ariz. 186, 560 P.2d 54 (1977) the court held that "the defendant's conduct in continuing his barrage of violence, inflicting wounds and abusing his victims, beyond the point necessary to fulfill his plan to steal, beyond even the point necessary to kill, was such an additional circumstance of a cruel and depraved nature so as to set it apart from the usual or the norm." The court based its holding on the following conduct of the defendant: the defendant initially shot the deceased's wife twice in the chest, dragged her into another room and shot her four more times in the head, for no apparent reason; then later, after the deceased had been shot and fallen to the floor, the defendant shot him in the back and kicked him in the face repeatedly, again for no apparent reason. The court quoted with approval the meaning of the terms "heinous, cruel or depraved" as stated in State v. Knapp, 114 Ariz. 531, 562 P.2d 704 (1977):

> "The words 'heinous, cruel or depraved' have meanings that are clear to a person of average intelligence and understanding. Webster's Third New International Dictionary defines them as follows:
>
> 'heinous: hatefully or shockinly evil: grossly bad.

PIMA COUNTY ATTORNEY
COUNTY GOVERNMENTAL CENTER
800 COURTS BLDG.
111 W. CONGRESS STREET
TUCSON, ARIZONA 85701
(602) 0411
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'cruel: disposed to inflict pain esp. in a wanton, insensate or vindictive manner: sadistic.

'depraved: marked by debasement, corruption, perversion or deterioration."

The court noted that it was this type of killing involving the additional circumstances of the nature noted above which set the crime apart from the usual or the norm, and which justified the imposition of the death penalty. It was this additional violence, over and above that which was necessary to carry out the defendant's criminal intent, that in effect distinguishes this murder from the "usual or the norm" of first degree murders.

In State v. Holsinger, 115 Ariz. 89, 563 P.2d 888 (1977), the defendant solicited the assistance of two other individuals to murder a certain doctor. When these two other individuals were to commit the murder, they only wounded the doctor but did end up killing the doctor's housekeeper. The court here found that in the commission of the offense, i.e., the attempted murder of the doctor, the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense, i.e., the housekeeper. The court in this case did not further explain its reasoning for its finding that this aggravating circumstance existed.

With respect to that aggravating circumstance discussed in A.R.S. §13-703(F)(6), the State would first call the Court's attention to State v. Bishop, 118 Ariz. 263, 576 P.2d 122 (1978). Obviously, this aggravating circumstance has to do with whether or not the offense was committed in an especially cruel, depraved and heinous manner. In Bishop, the defendant had struck the victim between two and four times with a hammer; immediately and systematically removed the victim's shoes, his wallet and money; hogtied the victim's legs, dragged him to a mine shaft and returned shortly thereafter to drop rocks and dirt on the victim, who lay struggling at the bottom of the hole. The Court found that the offense had been committed in an especially heinous,

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...County Governmental
...Center
...East Courts Bldg.
...West Congress Street
...Tucson, Arizona 85701
...792-8411
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cruel and depraved manner.

In State v. Knapp, 114 Ariz. 531, 562 P.2d 704 (1977), the defendant went into a room where his two infant daughters were sleeping, poured Coleman fuel, in great quantities, around the room, stood in the doorway and threw a lighted match into the room, then returned to his bed to lie down while the children burned and died. The autopsy revealed that the cause of death was not just carbon monoxide poisoning, the blood level of which was very low, but also incineration. The court noted that it could not think of a more ghastly death than this for anyone, and that this falls squarely within the meaning of "heinous, cruel and depraved."

Obviously, the similarity between the facts in Knapp, and the facts in the case presently before the Court are striking. The pathologist testified that although it was his opinion that Manuelita McCormack was dead at the time of the fire, it was medically possible that she was alive. Dr. Hirsh stated those circumstances which would support such a medical theory. Importantly, other testimony indicated that Manuelita McCormack had cried out "don't hurt baby Charlie". This would certainly indicate that she was alive after the time that she had been strangled and stabbed inasmuch as her reference to only baby Charlie would suggest that Patricia and Bernice had already been stabbed. It is clear from the evidence that Patricia and Bernice were stabbed after Manuelita McCormack.

All of this supports the State's theory that Manuelita McCormack was alive at the time her body was doused with gasoline and the house was set on fire. Knapp, demands that the death penalty be imposed in this case.

The State would also call the Court's attention to the case of State v. Blazak, 114 Ariz. 186, 560 P.2d 54 (1977), wherein the sentencing judge found that the crime had been committed in an especially cruel and depraved manner and that during the commission of the offense the defendant created a grave

PIMA COUNTY ATTORNEY
COUNTY GOVERNMENTAL CENTER
SUITE 400 COURTS BLDG.
111 W. CONGRESS STREET
TUCSON, ARIZONA 85701
792-8411

risk of death to others than the victim.

In Blazak, the defendant had entered a bar and demanded money from the bartender. When the bartender refused to comply, the defendant shot him four times. He then shot two more individuals, patrons of the bar, killing one. Significant in the court's decision that the aggravating circumstances relating to an especially cruel and depraved manner of death was the fact that defendant's conduct went far beyond that which was necessary to effectuate his criminal scheme. The defendant entered the bar intending to rob it. When the bartender refused to cooperate, the defendant shot him. The defendant did not stop there, but rather continued to shoot him. The defendant coldly murdered two persons for absolutely no reason; the murder of the bar patron was, according to the Knapp Court, particularly unnecessary and consciousless. It was this additional violence, over and above that which was necessary to carry out the defendant's criminal intent that distinguishes these murders from the "usual or norm" of first degree murders.

The Court also noted that there was no resistance by the bartender or any of the other people in the bar, and that there was no justification in any manner for the actions which resulted in the killings. In this sense, the defendant committed the offense in an especially cruel and depraved manner. In addition, the Court found that during the commission of the offense, the defendant knowingly created a grave risk of death to other persons in addition to the victim of the offense in that in addition to the two persons that were killed, there was an injury to another person in the bar and there was risk of injury to several others.

In Alvord v. State, 322 So. 2d 533 Fla. (1975), three murders were committed while the defendant was engaged in the commission of the felony offense of burglary. Each of these murders was especially heinous, atrocious and cruel in that the homicides were committed through strangulation by use of a rope. The court stated that this could only be accomplished by a cold,

PIMA COUNTY ATTORNEY
COUNTY GOVERNMENTAL CENTER
SUITE 800 COURTS BLDG.
111 W. CONGRESS STREET
TUCSON, ARIZONA 85701
792-8411
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calculated design to kill, as distinguished from a single shot from a firearm during an outburst of anger. The Alvord court also found that the defendant, in the commission of the offense, created a great risk of serious bodily harm by death to other persons in that the defendant obviously murdered two of the victims in order to avoid a surviving witness to the murder of the other victim. The court also noted that these murders were not committed under circumstances which the defendant believed provided a moral justification or extenuation for his conduct in his capacity to conform his conduct to the requirements of law was not impaired.

In Hoy v. State, 353 So.2d 826 (1978), the court in sentencing the defendant to death, seems to have considered the fact that the defendant had inflicted severe mental distress upon the victims before killing them. In Hoy, the defendant and his partner approached the victim's car, with gun in hand, and told the victims that the defendant wanted to have intercourse with the female. The victims were removed from a beach area where they had been sitting, to a secluded area, where the defendant overcame the girl's resistance and sexually assaulted her in the presence of her boyfriend. The boyfriend attempted to go to the girl's aid and was shot in the face. After falling to the ground he was shot twice more in the head. The female was then sexually assaulted by the defendant's partner and then shot twice in the side of her head. She was then again sexually assaulted, rolled over and then shot in the forehead. The court determined that these offenses were committed in especially heinous, atrocious, and cruel manner stating:

> "The capital felony was especially heinous, atrocious and cruel in that two attractive, vibrant teen-age youngsters in love with life and in love with each other were killed in cold blood in each others presence deliberately and mercilessly. The girl was raped in the presence of her fiance, and he was killed when he tried to help her. She had to know, as she was being violated, and begging for help, that she too would die at the hands of her merciless ravishers--as she did die."

PIMA COUNTY ATTORNEY
COUNTY GOVERNMENTAL CENTER
3RD COURTS BLDG.
32 N. CONGRESS STREET
TUCSON, ARIZONA 85701
792-8411
CA-58

The case of Washington v. State, 362 So.2d 658 (1978), also indicates what is sufficient aggravating circumstance to call for the death penalty. Washington involved three separate series of events. The defendant, in attempting to burglarize a residence, came upon the owner of the home and her three sisters-in-law together in one room. At this time he instructed them to lie on the floor permitting the owner to enter the kitchen and get some money. At this point, the defendant cut the telephone cord and tied up the four women. The defendant then shot the owner and repeatedly stabbed her with his knife, causing her death. He then shot each of the others in the head and inflicted several stab wounds. Each of the sisters-in-law survived the assault. In regards to this incident, the court stated:

> [4] Katrina Sirk was the victim of a calculated robbery which resulted in her murder. She was stabbed repeatedly and was also shot in the head. The bullet did not penetrate her skull and the cause of death was four of the nine stab wounds, none of which was instantly fatal. She was murdered in her own home in the presence of her three sisters-in-law who were later shot in the head and stabbed. The atrocity of the episode cannot be gainsaid."

The next series of events when the defendant and another enter a home with the intent to kill the owner. Upon finding the owner, the defendant's accomplice covered the owner's face with a pillow and held him helpless, while the defendant stabbed the victim to death. In holding that this offense was committed in an especially heinous, atrocious or cruel manner, the court stated:

> "The victim Pridgen was stabbed repeatedly while appellant's accomplice held him helpless and unable to defend himself. Pridgen received seven potentially fatal wounds, none of which could have caused instantaneous death. Dr. Fernandez testified that it would have taken minutes for the victim to die and Washington's confession established that Pridgen was struggling, wiggling, and trying to cry out. His face was covered with a pillow to mute the cries of pain and anguish

PIMA COUNTY ATTORNEY
COUNTY GOVERNMENTAL
CENTER
900 COURTS BLDG.
111 W. CONGRESS STREET
TUCSON, ARIZONA 85701
792-5511
CR-54

which attend such a ferocious stabbing attack."

In the third series of events, the defendant and others forcibly bound their victim to a bed, spread eagle, and the defendant then stabbed the victim to death. Holding these actions to be especially cruel, heinous or atrocious, the court stated:

> "The murder was effected while Meli was tied spread-eagled on a bed with no ability to resist. Once again an accomplice covered the victim's face with a pillow to stifle his outcry from receiving multiple stab wounds. That Meli was alive during the course of the attack is borne out by the testimony of Dr. Wright who related that although one of the stab wounds could have caused near instantaneous death, while each wound was delivered Meli had blood pressure capable of producing hemorrhage, indicating that life continued."

The court in Washington was faced with these three fact situations in which the victims were initially rendered helpless before being murdered. It seems that the fact that the offense was committed after placing the victim in a helpless situation is important in determining whether or not the imposition of the death penalty is appropriate.

In the present case, the State submits that many of the circumstances discussed in the cases above were certainly present.

The aggravating circumstance of creating grave risk of death to a person other than the victim is present inasmuch as Mr. Ortiz went to the house with the calculated intent to kill Manuelita McCormack. He brought gasoline with him and a hunting knife to accomplish the stabbing. It simply cannot be said that Mr. Ortiz did not create a grave risk of death to little Patricia, Bernice and Charlie during the commission of the offense that he intended prior to his arrival. In fact, Patricia and Bernice were both stabbed. In fact, all three children were in the house when

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PIMA COUNTY ATTORNEY
COUNTY GOVERNMENTAL CENTER
32 COUNTY BLDG.
111 W. CONGRESS STREET
TUCSON, ARIZONA 85701
792-8411
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Mr. Ortiz set it afire.

Additionally, if one believes, as the State does, that Manuelita McCormack was alive at the time the fire was set, then it is clear that the homicide by fire clearly created a grave risk of death to these three children, inasmuch as they were, effectively, trapped in two separate rooms of the house. The testimony of the arson experts clearly establishes this fact.

The question of whether or not the offense was committed in an especially cruel and heinous manner can be answered by reference to the facts which show that Mr. Ortiz strangled Manuelita McCormack, stabbed her more than once in the throat area and then set her body afire. Although Dr. Hirsh testified that in his opinion she was dead at the time of the fire, there is evidence to the contrary. Dr. Hirsh himself indicated that it was medically possible that Manuelita McCormack was alive. If in fact she was alive there can be no more cruel and heinous manner of inflicting death than to douse the body with gasoline and then burn it. Certainly the fact that the victim, Manuelita McCormack, was placed in the position of watching her two daughters being stabbed and having concern over her son, Charlie, also supports the conclusion that the homicide was committed in an especially cruel, heinous and depraved manner. If one concludes that Manuelita McCormack was alive at the time of the fire one must necessarily conclude that the defendant during the commission of the offense created a grave risk of death to other persons, namely the children. If one concludes that Manuelita McCormack was dead at the time of the fire one must reach the same conclusion for the reason that the defendant intended upon his arrival to commit the offense and the manner in which he committed the offense created such a risk to the children of Manuelita McCormack.

Also, the violence inflicted upon the three McCormack children after Mr. Ortiz had assaulted and ultimately killed Manuelita McCormack, was above and beyond that which was necessary

Pima County Attorney
County Governmental Center
South Courts Bldg.
111 W. Congress Street
Tucson, Arizona 85701
792-8011

to accomplish his intended purpose, that is, the killing of Manuelita McCormack. It is this kind of unnecessary violence that has been viewed by the Court as sufficient to warrant the imposition of the death penalty.

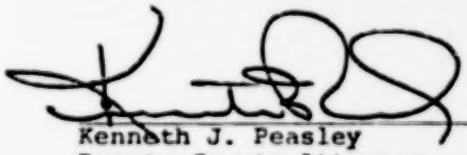
The State, therefore, respectfully submits that aggravating circumstances under A.R.S. §13-703(F)(3) and (6) exists and have been proved beyond a reasonable doubt.

Additionally, the State submits that there is no mitigation, let alone mitigation sufficiently substantial to call for leniency.

Therefore, the State on behalf of Manuelita McCormack, her children and the community, respectfully urges this Court to impose the penalty of death upon Ignacio A. Ortiz.

Respectfully submitted this 10th day of September, 1979.

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY



Kenneth J. Peasley
Deputy County Attorney

Elizabeth C. Peasley

Elizabeth C. Peasley
Deputy County Attorney

PIMA COUNTY ATTORNEY
COUNTY GOVERNMENTAL CENTER
900 COURTS BLDG.
111 W. CONGRESS STREET
TUCSON, ARIZONA 85701

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY
900 Pima County Courts Building
111 West Congress Street
Tucson, Arizona 85701
Telephone: 792-8411

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

THE STATE OF ARIZONA, Plaintiff, vs. IGNACIO A. ORTIZ, Defendant.	No. CR-00284 MORE DEFINITE STATEMENT RE: DEATH PENALTY REQUEST - AGGRAVATING CIRCUMSTANCES

COMES NOW the State of Arizona, by and through the Pima County Attorney, STEPHEN D. NEELY, and his Deputies, KENNETH J. PEASLEY, and ELIZABETH C. PEASLEY, and hereby makes the following more definite statement with respect to the State's request that the death penalty be imposed in this case on the Defendant IGNACIO A. ORTIZ.

Respectfully submitted this 12th day of September, 1979.

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY

Elizabeth C. Peasley
Elizabeth C. Peasley
Deputy County Attorney

Kenneth J. Peasley
Kenneth J. Peasley
Deputy County Attorney

Copy mailed/delivered this
13th day of September, 1979, to:

Honorable Ben Birdsall
Division 9
Judge of the Superior Court
111 West Congress Street
Tucson, Arizona 85701

Gary Grynkewich
406 North Church
Tucson, Arizona

PIMA COUNTY ATTORNEY
COUNTY GOVERNMENTAL
CENTER
900 COURTS BLDG.
111 W. CONGRESS STREET
TUCSON, ARIZONA 85701
792-8411

MORE DEFINITE STATEMENT

The Defendant has been convicted of First Degree Murder in cause number CR-00284.

Pursuant to A.R.S. § 13-703, the Defendant is subject to and the State is hereby asking for the imposition of the death penalty.

In order to justify the imposition of the death penalty, the State must prove the existence of at least one of those aggravating circumstances which are set forth at A.R.S. § 13-703(F).

The State hereby declares its intent to prove the existence of those circumstances set forth in § 13-703(F)(3) and (

A.R.S. § 13-703(F)(3) provides that:

> "In the commission of the offense, the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense."

The State hereby indicates that it intends to establish that the Defendant, in the commission of the offense, knowingly created a grave risk of death to Patricia McCormack, Bernice McCormack and Charlie McCormack, III.

A.R.S. § 13-703(F)(6) provides that:

> "The defendant committed the offense in an especially heinous, cruel or depraved manner."

The State will rely upon evidence presented at trial. In addition, the State may introduce any matter or item which was disclosed in CR-00284 or CR-00767, whether or not such evidence was introduced at trial, including but not limited to the photographs of Manuelita McCormack's body. As any new evidence, testimony or witnesses become known to the State, such will be made available immediately to defense counsel.

PIMA COUNTY ATTORNEY
COUNTY GOVERNMENTAL CENTER
CIVIL DIVISION
111 W. CONGRESS STREET
TUCSON, ARIZONA 85701
792-8411

Respectfully submitted this ____ day of September, 1979.

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY

Elizabeth C. Peasley
Elizabeth C. Peasley
Deputy County Attorney

Elizabeth C. Peasley for
Kenneth J. Peasley
Deputy County Attorney

Copy of the foregoing mailed/delivered this 13th day of September, 1979, to:

Honorable Ben Birdsall
Division 9
Judge of the Superior Court
111 West Congress
Tucson, Arizona 85701

Gary Grynkewich
406 North Church
Tucson, Arizona

PIMA COUNTY ATTORNEY
COUNTY GOVERNMENTAL CENTER
DOS COURTS BLDG.
111 W. PROGRESS STREET
TUCSON, ARIZONA 85701
792-8211
CA-56

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STEPHEN D. NEELY
PIMA COUNTY ATTORNEY
900 Pima County Courts Building
111 West Congress Street
Tucson, Arizona 85701
Telephone: 792-8411

CR-00284

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

THE STATE OF ARIZONA, Plaintiff, vs. IGNACIO A. ORTIZ, Defendant.	No. CR-00284; CR-00767 ADDITIONAL MATTERS PERTAINING TO STATE'S MORE DEFINITE STATEMENT CONCERNING THE DEATH PENALTY

COMES NOW the State of Arizona, by and through the Pima County Attorney, STEPHEN D. NEELY, and his Deputies, KENNETH J. PEASLEY, and ELIZABETH C. PEASLEY, and respectfully submit the following supplemental more definite statement setting forth factors, in addition to those contained in the original more definite statement, which will be relied upon and presented by the State in seeking the imposition of the death penalty.

Respectfully submitted this 2nd day of October, 1979.

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY

Kenneth J. Peasley
Deputy County Attorney

Elizabeth C. Peasley
Deputy County Attorney

Copy mailed/delivered this
2nd day of October, 1979, to:

Gary S. Grynkewich
406 North Church
Tucson, Arizona

R

PIMA COUNTY ATTORNEY
COUNTY GOVERNMENTAL CENTER
900 COURTS BLDG.
111 W. CONGRESS STREET
TUCSON, ARIZONA 85701

MEMORANDUM OF POINTS AND AUTHORITIES

The State at this time would notice the Defendant that the State will also attempt to show that aggravating circumstances exist under A.R.S. § 13-703(F)(1) which reads as follows:

> "The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable."

Obviously, the Defendant in this case suffered a conviction for Conspiracy to Commit First Degree Murder. This offense is punishable by life imprisonment. Therefore, the State will introduce evidence of the Defendant's conviction for the charge of Conspiracy to Commit First Degree Murder in order to establish an aggravating circumstance under § 13-703(F)(1) in order to justify the imposition of the death penalty.

The State will rely upon those other factors already set forth in the State's more definite statement filed previously.

Additionally, the State would at this time indicate more particularly that it will rely upon evidence and testimony presented at a no bond hearing in this case under Justice of the Peace Court Number IC-5758, which hearing was had on December 26, 27 and 28, 1978 before the Honorable Jack G. Marks, sitting as magistrate.

Additionally, the State will rely upon and offer the testimony of witnesses who testified in the trial of MARY FRANCES ORTIZ under Cause Number CR-00767, including the testimony of MARY FRANCES ORTIZ.

The State will offer the testimony of MRS. ORTIZ as aggravation in Counts Two through Eight in Cause Number CR-00284, in Cause Number CR-00767, and as rebuttal to any mitigation presented by the Defendant with respect to the

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PIMA COUNTY ATTORNEY
COUNTY GOVERNMENTAL CENTER
DOD COURTS BLDG.
111 W. CONGRESS STREET
TUCSON, ARIZONA 85701
792-8411

Defendant's conviction for First Degree Murder in Cause Number CR-00284.

Additionally, the State may call as a witness Cynthia J. Ginnetti, P.H.D., whose report is attached hereto, or offer said report concerning Counts Two through Eight in Cause Number CR-00284, in Cause Number CR-00767 and as rebuttal to any mitigation presented by the Defendant with respect to his conviction for First Degree Murder in Cause Number CR-00284. The State may also offer the report prepared by Dr. Ginetti, a copy of which is attached hereto. This would be pursuant to the reasoning above.

The evidence and testimony eluded to above, as well as any and all evidence, testimony or exhibits under Cause Number CR-00284 or CR-00767, with respect to the Defendants IGNACIO A. ORTIZ and MARY FRANCES ORTIZ, whether said evidence, testimony or exhibits have been offered or admitted into evidence in either trial or hearings pursuant to said Cause Numbers, will be utilized by the State of Arizona insofar as it is necessary in order to establish the aggravating circumstances set forth in the State's more definite statement and supplemental more definite statement and/or in rebuttal to any mitigation presented by the Defendant.

Respectfully submitted this 2nd day of October, 1979.

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY

Kenneth J. Peasley
Deputy County Attorney

Elizabeth C. Peasley
Deputy County Attorney

PIMA COUNTY ATTORNEY
COUNTY GOVERNMENTAL CENTER
SOUTH COURTS BLDG.
111 W. CONGRESS STREET
TUCSON, ARIZONA 85701
792-8411

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA, Plaintiff, v. IGNACIO A. ORTIZ, Defendant.	No. CR-00284 DEFENDANT'S MEMORANDUM ON AGGRAVATING CIRCUMSTANCES

The State claims in its Memorandum on Death Penalty and More Definite Statement that IGNACIO ORTIZ should be killed because the murder of which he was convicted was committed in an especially heinous, cruel, or depraved manner and because in the commission of the murder of which he was convicted he knowingly created a grave risk of death to other people.

Within its Memorandum, the State has included statements such as, "The pathologist testified that although it was his opinion that Manuelita McCormack was dead at the time of the fire, it was medically possible that she was alive." Memorandum at 6. Because of this and other similar statements made by the State, it is necessary to establish by what burden of proof, the State is required to establish the statutory aggravating circumstances.

There can be no doubt that the State must prove the aggravating circumstances upon which it relies beyond a reasonable doubt. In Florida, with a statute virtually identical to Arizona, the Supreme Court has ruled that the aggravating circumstances must be proved beyond a reasonable doubt. Alvord v. State, 322 So. 2d 533 (Fla. 1975). Likewise, in State v. Simants, 197 Neb. 549, 250 N.W. 2d 881 (1977), cert. denied, 434 U.S. 878, 98 S. Ct. 231, 54 L. Ed. 2d 158, the Nebraska Supreme Court ruled that the State must prove aggravation beyond a reasonable doubt. Accord, e.g., Waye v. Commonwealth,

LAW OFFICES
KLEIN & KLEIN
100 NORTH STONE AVENUE, SUITE 803
TUCSON, ARIZONA 85701
(602) 623-3436

251 S.E. 2d 202 (Va. 1979). Thus, in determining whether there are sufficient aggravating circumstances to justify the extermination of a human life, it is not sufficient for the Court to find that there may be some evidence to establish the circumstances alleged. Rather, the evidence must prove beyond a reasonable doubt that, with reference to this case, the murder was especially heinous, cruel, or depraved and that other persons' lives were gravely endangered by the commission of the murder.

Is there sufficient evidence to prove beyond a reasonable doubt that the murder was committed in an especially cruel, heinous, or depraved manner? In its review of various cases (many of which do not appear relevant to the facts in this case), the State has failed to consider State v. Stewart, 197 Neb. 497, 250 N.W. 2d 849 (1977). In Stewart, the Nebraska Supreme Court was confronted with facts which were quite similar to those in the instant case. In Stewart, the Defendant met two other people in a van to discuss a marijuana transaction; he had brought a gun and a gasoline can in case the meeting did not progress well. Ultimately the defendant shot both people in the back of the head. He then poured gasoline around the van and ignited it. One of his victims died instantaneously from the gunshot. The other victim survived and escaped from the fire.

One of the aggravating circumstances justifying the imposition of the death penalty in Nebraska is:

> "'The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence.'" 250 N.W. 2d at 861.

The trial judge found that the crime was especially heinous. 250 N.W. 2d at 864. The Supreme Court of Nebraska reversed that finding and concluded that that circumstance "was not proved beyond a reasonable doubt, and should not be applied."

LAW OFFICES
KLEIN & KLEIN
100 NORTH STONE AVENUE SUITE 803
TUCSON, ARIZONA 85701
(602) 623-3436

Id. The Court ruled that, because one could reasonably conclude that the victim died before the fire was started and that therefore the fire was not set for the purpose of causing further harm to the victim, imposition of the death penalty could not lawfully rest upon that justification.

In the instant case, one could also reasonably conclude that Manuelita McCormick died before the fire started. That, in fact, was the conclusion reached by Dr. Louis Hirsch, the State's pathologist, after conducting an autopsy and reviewing the scientific evidence. Likewise, as in Stewart, one can reasonably conclude that the fire was not set for the purpose of causing further harm to the victim, nor did it, in fact, inflict additional suffering on the victim. Therefore, this murder was not committed in an especially heinous, cruel or depraved manner.

The State appears to claim, nevertheless, that the murder was especially heinous, cruel or depraved for three reasons: first, because the victim was stabbed more than once; second, because the body of the victim was burned by the fire; and third, because, the State speculates, the victim saw Defendant stab her daughters before she died. The latter two reasons are not supported by the evidence. The first reason is not substantiated by the case law.

The evidence introduced at the trial suggested that Manuelita McCormick was stabbed four times. The State apparently contends that the infliction of multiple stab wounds made this offense especially heinous, cruel or depraved. That contention is not supported by the decision of the Supreme Court of Arizona in State v. Watson, 120 Ariz. 441, 586 P. 2d 1253 (1978). In Watson, the defendant shot the victim four times in the back, the last time while the victim was face down on the floor. Although the victim had been wounded

LAW OFFICES
KLEIN & KLEIN
100 NORTH STONE AVENUE, SUITE 903
TUCSON, ARIZONA 85701
(602) 623-3436

several times, the Supreme Court ruled that the shooting was not "accomplished in such a manner as to set it apart from the norm of first degree murders...." 120 Ariz. at 448, 586 P. 2d at 1260. The Supreme Court acknowledged that the murder was "shocking," but concluded that:

> "We do not believe that the killing of the defendant was in a particularly heinous, cruel or depraved manner as contemplated by the statute and that aggravating factor number 6 of A.R.S. § 13-454 (E) was not shown." 120 Ariz. at 448, 586 P. 2d at 1260.

Unless the State contends that the Legislature intended to apply a different standard to killings committed with knives, it cannot be seriously argued that this murder was committed in an especially heinous, cruel or depraved manner.

Likewise, the other arguments made by the State do not support a finding that this was an especially heinous, cruel or depraved murder. The State has claimed that the killing was unnecessarily torturous to the victim because she was burned by the fire and she saw Defendant stab her daughters before she died. A clear preponderance of the evidence establishes that the fire did not contribute to the death of the victim. Dr. Louis Hirsch testified that he could find no physical evidence which suggested that the fire contributed to the death of the victim. Indeed, it was his conclusion that the stab wounds were the cause of death. While he indicated that it was possible that the victim was alive at the time of the fire, his testimony was clear that it was much more likely that Manuelita McCormick had died by the time the fire was started. Thus State v. Knapp, 114 Ariz. 531, 562 P. 2d 704 (1977), cited by the State, is factually and qualitatively different since in Knapp the undisputed cause of death was the fire.

The claim that the victim saw Defendant stab her daughters is also not supported by the weight of the evidence. Initial-

LAW OFFICES
KLEIN & KLEIN
100 NORTH STONE AVENUE, SUITE 803
TUCSON, ARIZONA 85701
(602) 623-3436

ly, it is important to observe that on December 22, 1978, shortly after the incident occurred, Bernice McCormick told Detective Reuter that her sister Patricia "said don't hurt baby CHARLIE...." Statement of Bernice McCormick, December 2, 1978, at page 7, lines 22-23. Furthermore, the testimony suggests the following sequence of events: the children heard their mother scream; Bernice went to the area of the living room; there, Bernice saw her mother with the Defendant on top of her; after Bernice saw her mother, her mother didn't say a word; the Defendant told her to go back to her room; she returned to her room and played with clay; later, Defendant went to the bedroom area and asked that Patricia come to the living room; Bernice followed Patricia to the living room where they were stabbed. This sequence of events, together with the testimony of Dr. Hirsch indicates that Manuelita McCormick did not see the Defendant stab her daughters. She had died before they were stabbed. Therefore the killing of Manuelita McCormick was not especially heinous, cruel or depraved.

The State also contends that the Defendant should be executed because in the commission of the murder of Manuelita McCormick he "knowingly created a grave risk of death to another person or persons in addition to the victim of the offense." A.R.S. § 13-703 (F)(3). The State claims that this circumstance is proven because the Defendant has been found guilty of stabbing Patricia and Bernice and because all of the children were in the house when the fire was set. In advancing this argument, the State tacitly proposes what might be referred to as a "continuing transaction test." In other words, because the evidence shows that the act of killing preceded either the stabbing of the girls or the fire, the State is claiming that they were a part of the continuing transaction. However, the Supreme Court of Arizona rejected that ap-

LAW OFFICES
KLEIN & KLEIN
100 NORTH STONE AVENUE, SUITE 803
TUCSON, ARIZONA 85701
(602) 623-3436

Copy of the foregoing was
~~mailed~~/delivered this 3rd
day of October, 1979 to:

Gary Grynkewich, Esquire
406 North Church Avenue
Tucson, Arizona 85701
Co-Counsel for Defendant

Elizabeth and Kenneth Peasley, Esquire
Deputy Pima County Attorney
111 West Congress, Ninth Floor
Tucson, Arizona 85701

Honorable Ben C. Birdsall
Judge, Pima County Superior Court
111 West Congress
Tucson, Arizona 85701

LAW OFFICES
KLEIN & KLEIN
100 NORTH STONE AVENUE, SUITE 603
TUCSON, ARIZONA 85701
(602) 623-3436

proach in State v. Ceja, 115 Ariz 413, 565 P. 2d 1274 (1977). In Ceja, the defendant murdered a husband and a wife. When he murdered the wife, or shortly thereafter, the husband drove to and entered the house. The defendant then shot and murdered the husband. The Supreme Court ruled that the trial court erred when it found that in the commission of the offense against the wife, the defendant knowingly created a grave risk to the husband. The Supreme Court explained:

> "... the evidence does seem to indicate that Randy did not drive up to the house until the appellant had dragged Linda into the bedroom and shot her again. At the least, it appears that Randy was still outside or in another room while the shooting was going on in the bedroom. Whichever version is correct, there was no evidence presented which tended to demonstrate that the appellant, in killing Linda, created a grave risk of death to Randy. Absent supportive evidence, we must hold that the court's finding of the existence of that aggravating circumstance was error." 115 Ariz. at 416, 565 P. 2d at 1277.

In short, the Supreme Court considered the acts related to the killing, not the continuing transactions. The Supreme Court of Arizona has rejected the approach advocated by the State.

Applying the test set forth in Ceja, in killing Manuelita McCormick, did the Defendant knowingly create a grave risk of death to another person? The answer must be no. There was no possibility of an errant bullet striking anyone. The only person who was or could have been injured in the stabbing of Manuelita McCormick was Manuelita McCormick.

Therefore, there are no aggravating circumstances which justify imposition of the death penalty. The Defendant should be sentenced to life imprisonment in accordance with A.R.S. § 13-703 (A).

RESPECTFULLY SUBMITTED this 3rd day of October, 1979.

LAW OFFICES OF KLEIN & KLEIN

By Donald S. Klein
Donald S. Klein
Attorneys for Defendant

LAW OFFICES
KLEIN & KLEIN
100 NORTH STONE AVENUE, SUITE 803
TUCSON, ARIZONA 85701
(602) 623-3436